Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

JAMES C. MORGAN,

Petitioner,

v.

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allowing a supervisor to lose qualified immunity based on constructive knowledge of a subordinate's misconduct effectively eviscerates this Court's standard under *Anderson v. Creighton*, 483 U.S. 635 (1987) for qualified immunity under 42 U.S.C. § 1983?

2. Whether qualified immunity is available as a defense to individual capacity claims made under 42 U.S.C. § 1985(3)?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit are as follows:

Plaintiffs-Appellees

Tom Swint
Tony Spradley
Drucilla James
Jerome Lewis

Defendants-Appellants

The City of Wadley, Alabama
Freddie Morgan (Police Chief for City of Wadley, Alabama)
Gregory Dendinger (Police Officer for the City of Wadley, Alabama)
Chambers County Commission
James C. Morgan (Sheriff of Chambers County, Alabama)

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TOM SWINT, TONY SPRADLEY,
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Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner James C. Morgan respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which affirmed in part and reversed in part, the district court's denial of petitioner's motion for summary judgment, is reported as *Swint v. City of Wadley, Ala.*, 5 F.3d

1435 (11th Cir. 1993) and is reproduced in the Appendix, App. 1. The court of appeals' modification of the opinion and denial of petitioner's suggestion of rehearing *en banc* is reported as *Swint v. City of Wadley, Ala.*, 11 F.3d 1030 (11th Cir. 1994) and is reproduced in the Appendix, App. 71.

The district court's initial decision entered on June 2, 1992, granting in part and denying in part petitioner's motion for summary judgment is not reported and is reproduced in the Appendix, App. 40. The district court's order denying the parties' motion for reconsideration which was entered on June 26, 1992 is not reported and is reproduced in the Appendix, App. 67.

JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit was released on November 3, 1993. Appendix, App. 1. Petitioner's Suggestion of Rehearing En Banc was denied and the Opinion was modified by the original panel on January 18, 1994. Appendix, App. 71. Jurisdiction of this Court to review this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment and the Fourteenth Amendment of the United States Constitution. The statutory provisions

involved are 42 U.S.C. § 1983 and 42 U.S.C. § 1985. The texts of these constitutional and statutory provisions are reproduced in the Appendix, App. 75.

STATEMENT OF THE CASE

James C. Morgan (hereinafter "Sheriff Morgan") is the Sheriff of Chambers County, Alabama. Timothy Birchfield (hereinafter "Birchfield") is an Investigator employed by Sheriff Morgan. Birchfield specializes in narcotics investigations for the Chambers County Sheriff's Department and was responsible for directing the narcotics investigation and operation on the Club Capri.

This lawsuit stems from two law enforcement raids on the Club Capri, a nightclub located in Chambers County, Alabama. Although outside any city limits, the club is within the police jurisdiction of the City of Wadley, a community located in Randolph County, Alabama. Tom Swint and Tony Spradley are owners of the club. Drucilla James is a club employee who was present during both of the raids. Jerome Lewis is a club patron who was present during the second raid.

During 1990, the Chambers County Sheriff's Department began receiving numerous citizens' complaints regarding drug deals taking place within the Club Capri. Birchfield began an investigation of these complaints. In his investigation, Birchfield contacted the City of Wadley Police Department and inquired as to whether they had received information regarding illegal drug activity taking place within the Club Capri. Birchfield reviewed the information accumulated by the City of Wadley Police

Department and discussed the information with other members of the Chambers County Drug Task Force.

The Chambers County Drug Task Force consists of the Chambers County Sheriff's Department and the police departments of the cities of Lafayette, Lanett, and Valley, Alabama. Investigators of all departments are on the Drug Task Force. Investigators of these departments recommended to their respective department heads that a narcotics investigation and operation be undertaken at the Club Capri. Each department head authorized the participation of their respective police departments.

In December, 1990, Birchfield informed Sheriff Morgan of the information he had accumulated regarding suspected drug activity at the Club Capri. Birchfield discussed with Sheriff Morgan his recommendation to send an undercover officer and a confidential informant into the Club Capri to attempt a drug buy from one of several persons suspected of selling illegal narcotics. Birchfield requested approval for the Chambers County Sheriff's Department to participate in a joint narcotics operation by the Chambers County Drug Task Force based on information he had acquired. A decision for the Sheriff's Department to participate in this operation was approved by Sheriff Morgan. The police departments from cities of Lafayette, Lanett, and Valley, Alabama also approved of this investigation and agreed to participate in the operation. Sheriff Morgan's only involvement in the drug raid of December 14, 1990 was giving Birchfield his approval for the narcotics investigation and operation on behalf of the Chambers County Sheriff's Department.

Joining the Drug Task Force on this operation were representatives of the City of Wadley Police Department and the Alabama Alcoholic Beverage Control Board (hereinafter "ABC Board"). The total strength assembled by the task force for the raid was between 30 and 40 law enforcement officers. In accordance with the operation plan devised by Birchfield, an undercover officer and a confidential informant entered the club on December 14, 1990 while the other task force members remained out of sight. While inside, the undercover officer was offered marijuana and crack cocaine for sale by a patron previously suspected of selling illegal narcotics. After purchasing these drugs with marked money, the officer left the club and signaled for other members of the task force to enter the club.

Initial entry of the club was made by the City of Lanett, Alabama's SWAT Team consisting of approximately eight officers. Within 30 seconds of the SWAT Team's entry, the other members of the task force entered. The person who had sold the undercover officer drugs was identified and arrested. The task force officers pointed their weapons at Respondents Spradley and James and others who were present. Participants in the raid searched the club's cash register and door receipt box; also some marked money was confiscated from the door receipt box. Persons inside the club were prohibited from moving or leaving until the investigation, which lasted one to one and one-half hours, was over.

During this raid in December, 1990, illegal liquor was seized by an ABC Board officer who participated in the raid. Additionally, several minors were found inside the club. Two people were arrested during this raid: the

man who sold the undercover officer drugs and, that man's younger brother, a minor who had in his possession some of the marked money the undercover officer had used to pay for the drugs. After the December, 1990 raid on the Club Capri, Birchfield reported back to Sheriff Morgan and indicated that the investigation resulted in two arrests and that several bottles of illegal liquor were confiscated by the ABC Board officer. The person who was arrested for sale of illegal drugs to the undercover officer pleaded guilty and was convicted of the sale and possession of cocaine and sale and possession of marijuana.

After the raid of December 14, 1990, Sheriff Morgan received information from a confidential informant about additional illegal drug activities taking place inside the Club Capri. Other members of the Chambers County Sheriff's Department also received complaints regarding illegal drug activity on the premises of the Club Capri. Sheriff Morgan requested that Birchfield investigate the complaints to determine if there was sufficient evidence to warrant another narcotics operation. Birchfield investigated the information, discussed it with other members of the Drug Task Force, and advised Sheriff Morgan that there was sufficient evidence to initiate another drug operation. Upon information received from Birchfield, Sheriff Morgan authorized the participation by the Chambers County Sheriff's Department in a second narcotics operation involving the Club Capri. The department heads of the cities of Lafayette, Lanett, and Valley, Alabama, also authorized their departments' participation.

Sheriff Morgan's only participation in the second drug operation at the Club Capri was the receipt of

information from a confidential informant, his request to Birchfield to investigate and his approval of the drug operation on behalf of the Chambers County Sheriff's Department after the investigation by Birchfield. Sheriff Morgan was never the "supervisor" of the multi-governmental narcotics operations conducted at the Club Capri.

Sheriff Morgan was not present during either drug operation. There is no evidence that Sheriff Morgan knew of any of the constitutional violations which the respondents have alleged to have occurred during the Drug Task Force operations at the Club Capri either in December, 1990 or March, 1991. Sheriff Morgan was not aware of the cash register or door receipt box being searched; that guns were pointed at patrons' faces; that patrons were held for such a long period of time; or that any patrons were searched. Sheriff Morgan's only knowledge of what transpired during the December, 1990 raid was that it resulted in the arrest of two persons, one of whom was convicted of drug charges, and that illegal liquor was seized by the ABC Board.

On August 15, 1991, the respondents filed a four count complaint against the City of Wadley, Alabama, Chambers County Commission, the Chambers County Sheriff's Department; and, Wadley Police Chief Freddie Morgan, Wadley Police Officer Gregory Dendinger, and Sheriff James C. Morgan of Chambers County, Alabama in their official and individual capacities. None of the Chambers County Sheriff's Department employees who actually participated in the drug operations were named as defendants. Respondents alleged in their complaint claims brought under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 for, among other things, violations under the

Fourth Amendment to the United States Constitution and a claim of conspiracy. Jurisdiction of the district court was proper under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

After the district court ruled on the various motions to dismiss and motions for summary judgment, the following issues remained against Sheriff Morgan in his individual capacity: claims pursuant to 42 U.S.C. § 1983 for violation of the Fourth Amendment; due process violations and equal protection violations of the Fourteenth Amendment; and, claims for conspiracy under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).

On November 3, 1993, the Eleventh Circuit issued its decision holding that the petitioner in his individual capacity did not have qualified immunity from claims arising under the Fourth Amendment; petitioner sued in his individual capacity did not have qualified immunity for claims of equal protection violations; petitioner sued in his individual capacity did have qualified immunity for alleged due process violations; and affirmed without opinion denial of qualified immunity for respondents' conspiracy claims under § 1983 and § 1985(3). On November 23, 1993, petitioner timely filed his suggestion of rehearing *en banc* requesting review of these rulings. On January 14, 1994, the court issued an opinion modifying the earlier opinion by reversing the district court's denial of petitioner's qualified immunity for respondents' equal protection claims, and further denying rehearing *en banc*.

REASONS TO GRANT THE WRIT

I. THIS COURT HAS NEVER ADDRESSED QUALIFIED IMMUNITY IN THE CONTEXT OF SUPERVISORY LIABILITY AND THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT OVER THE ISSUE OF WHETHER *CONSTRUCTIVE* KNOWLEDGE OF A SUBORDINATE'S MISCONDUCT IS SUFFICIENT TO IMPOSE INDIVIDUAL LIABILITY UPON THE SUPERVISOR.

This Court, in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), established the standard for determining whether an official's conduct was objectively legally reasonable in light of clearly established law and the information the official possessed. These principles have been given varying interpretations by the courts of appeal when analyzing whether a supervisor is entitled to qualified immunity in cases alleging supervisory liability under 42 U.S.C. § 1983. The question remains as to whether, absent evidence of an unconstitutional policy, actual knowledge of subordinate misconduct is required to defeat qualified immunity of a supervisor? If not, when is constructive knowledge sufficient?

Nearly eighteen years ago in *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court formulated the analysis which has become the starting point for the determination of supervisory liability. *Rizzo* made it clear that supervisors are responsible for the constitutional violations of their subordinates only when evidence establishes that the supervisor had "direct responsibility for the actions" of his subordinate – an "affirmative link" between the supervisor and the misconduct. 423 U.S. at 371, 375-76. Although *Rizzo* arose from the context of a request for

injunctive relief, the circuit courts of appeal soon began to apply *Rizzo's* pronouncements to claims for damages filed against supervisors under 42 U.S.C. § 1983. *See, e.g., Archibald v. Mosel,* 677 F.2d 5, 7 n.2 (1st Cir. 1982); *Black v. Stephens,* 662 F.2d 181, 189 (3rd Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982); *Wilson v. Beebe,* 612 F.2d 275, 276 (6th Cir. 1980); *Harris v. Pirch,* 677 F.2d 681, 685 (8th Cir. 1982); and *Williams v. Bennett,* 689 F.2d 1370, 1381 (11th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983). This Court first gave its nod of approval to such an extension of *Rizzo* in 1981. *See Parratt v. Taylor,* 451 U.S. 527, 537 n. 3. (1981); and *Polk County v. Dodson,* 454 U.S. 312, 326 (1981) (Both citing *Rizzo* in the context of a § 1983 damages claim).

After laying the foundation for the analysis of an individual supervisor's liability under § 1983 in *Rizzo,* this Court has had no meaningful opportunity to define its boundaries. In their own attempts to set out the limits of supervisory liability, the circuit courts of appeal have been unable to come to an agreement on the issue of whether, absent proof of an unconstitutional policy or direct participation, a supervisor's *constructive* knowledge of a subordinates's misconduct can create supervisory liability. At least five circuits appear to require actual knowledge of subordinate's wrongdoing before liability can be imposed upon the supervisor. *See Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478 (3rd Cir. 1990) ("The necessary involvement can be shown in two ways, either 'through allegations of personal direction or of *actual knowledge* and acquiescence.' ") (emphasis added); *Angarita v. St. Louis County,* 981 F.2d 1537, 1545 (8th Cir. 1992) (Holding supervisor must have "participated to some extent . . . and *known about* and facilitated the

conduct, approved it, condoned it, or turned a blind eye . . . ") (emphasis added); *Knop v. Johnson*, 977 F.2d 996, 1014 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1415 (1993) (Supervisor not liable unless he "encouraged the misconduct or in some other way directly participated in it."); *Sanders v. English*, 950 F.2d 1152, 1160 (5th Cir. 1992) (No evidence supervisor knew of or condoned misconduct, or turned a "blind eye" to it.); *Redman v. County of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 972 (1992) (Sheriff not liable for second rape of inmate when sheriff had not been "personally apprised" of a phone call informing jail officials of the first rape); and *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977) (Council members not liable where there was no evidence that they knew of or condoned their subordinate's actions); *see also Lozano v. Smith*, 718 F.2d 756, 769 (5th Cir. 1983) (Sheriff's failure to supervise was not conduct "intentionally or knowingly committed with purpose of injuring" the plaintiff). Contrary to these holdings, the Eleventh Circuit, in the case below, effectively holds that constructive knowledge is sufficient to impose supervisory liability.[1]

The doctrine of qualified immunity, significantly modified by *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981), creates further questions as to when supervisors can be

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[1] Apparently even the dissenters in *Rizzo* would not have extended liability to supervisors who had not received complaints of their subordinate's wrongdoing. *Lewis v. Hyland*, 434 U.S. 931, 932-933 (1977) (dissenting opinion upon denial of certiorari). "A failure to act in the face of *knowledge of subordinate's illegal actions* is surely different from a failure to correct a statistical pattern of which one is not aware." *Id.* (emphasis added).

found liable *in their individual capacities* for the misdeeds of their subordinates. The current qualified immunity analysis focuses, at least in part, upon the information or knowledge possessed by the defendant public official.

> Our cases establish that qualified immunity shields agents Hunter and Jordan from suit for damages if "a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law *and the information the [arresting] officers possessed.*" *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

Hunter v. Bryant, 112 S.Ct. 534, 536 (1991) (per curiam) (emphasis added). The inquiry into "information . . . possessed" must be taken one step further when the defendant public official is a supervisor who did not personally participate in the alleged wrongdoing: Can knowledge actually known by a subordinate be imputed to his supervisor in order to defeat the supervisor's qualified immunity defense? Although not arising out of the context of supervisory liability, this Court's statement in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), implies that some type of actual knowledge may be required, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who *knowingly* violate the law." *Id.* (emphasis added). This Court has never addressed a direct interface of supervisory liability and qualified immunity although there appears to be a conflict in the circuit courts of appeal.

Two circuits have chosen to analyze a supervisor's claim of qualified immunity strictly upon what the supervisor knew or reasonably believed, in essence, actual knowledge. *See Cecere v. City of New York*, 967 F.2d 826, 829 (2nd Cir. 1992) (Denial of supervisor's qualified immunity reversed where supevisor reasonably believed information provided by subordinates); *Foster v. Basham*, 932 F.2d 732, 735 (8th Cir. 1991) (Dismissal of supervisor based upon qualified immunity upheld where supervisor did not have information that implementation of her facially valid policies resulted in deprivations); *contra, Marsh v. Arn*, 937 F.2d 1056, 1065 (6th Cir. 1991) (Although upholding the defendants' qualified immunity, the court intimates that the supervisor's knowledge "either actual or *inferred*" could have changed the result.) (emphasis added).

In contrast to the holdings of the Second Circuit and the Eighth Circuit, the Eleventh Circuit, in the case below, reformulates the qualified immunity query by omitting any substantive inquiry into the information Petitioner Morgan actually possessed. The court below describes in great detail the facts of the December, 1990 Capri Club raid and the alleged wrongs visited upon its owners and patrons as a result. *Swint*, 5 F.3d at 1439-40. While acknowledging Sheriff Morgan's arguments as to his lack of personal knowledge, the court based its denial of qualified immunity on two facts: Sheriff Morgan authorized both Club Capri narcotics investigations and that he had been "debriefed" after the first one.[2] *Id.* at 1446-47.

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[2] The court of appeals emphasizes the fact that Sheriff Morgan was "debriefed" about the December 14, 1990 Club Capri

Thus, despite lack of actual knowledge of the alleged constitutional deprivations, Sheriff Morgan is stripped of qualified immunity based upon his *constructive* knowledge of subordinates' wrongdoing: he authorized the investigations; he was debriefed after the first "raid;" therefore, Sheriff Morgan *must have known* – his subordinates *must have informed him* of the details. In this manner, information of misconduct actually known only to subordinates or eye-witnesses is subtly imputed to Sheriff Morgan. This is the essence of the court of appeal's holding since the undisputed evidence establishes that Sheriff Morgan, while approving the investigation generally, never authorized searches or arrests without probable cause and exigent circumstances; Sheriff Morgan never knew that bar patrons had been searched; and, that Sheriff Morgan's "debrief[ing]" consisted entirely of Birchfield's statement that a "drug buy" was made, persons were arrested, and illegal alcohol was seized. If Sheriff Morgan's entitlement to qualified immunity had been adjudged on the basis of his actual knowledge, that is, the information *he* possessed, the outcome would have been different.

The same analysis applies to the § 1983 conspiracy claims against Sheriff Morgan. The only link between Sheriff Morgan and the actual participants in the Club Capri investigations is by means of Birchfield. Again, Sheriff Morgan only generally authorized narcotics investigations of the Club Capri to be carried out by his most

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investigation, yet ignores the undisputed evidence as to the *contents* of the so-called debriefing.

experienced and well-trained narcotics officer. The planning was done exclusively by Birchfield and other members of the drug task force. There is no evidence that Birchfield and other task force members came to an understanding that they were going to violate respondents' constitutional rights nor is there evidence that Sheriff Morgan was apprised of such an understanding. Yet, both the district court and the court of civil appeals allowed the § 1983 conspiracy claims to stand.

This case presents the opportunity for the Court to revisit and refine the principles of supervisory liability from *Rizzo*, especially as they relate to the qualified immunity defense of a supervisor. As Justice Marshall concluded soon after *Rizzo* was released,

> One can accept *Rizzo*, however, and yet view it as only one step in, rather than the end of, this Court's continuing effort to define the contours of § 1983 suits against public officials who, with varying degrees of personal participation, have allowed the violation of citizen's rights by subordinate employees. Certainly the lower courts have not found in *Rizzo* any unambiguous signal; to the contrary, they have given the opinion varying interpretations that suggest the need for guidance from this Court. (footnote omitted).

Lewis v. Hyland, 434 U.S. 931, 932 (1977) (Marshall, J., dissenting from denial of certiorari). That "need for guidance" not only remains, it has been intensified by the evolving qualified immunity determination and its emphasis on "information the [defendant] officer possessed." *See Anderson*, 483 U.S. at 641.

II. THIS COURT HAS NEVER ADDRESSED THE QUESTION OF WHETHER QUALIFIED IMMUNITY IS AVAILABLE AS A DEFENSE TO CLAIMS MADE UNDER 42 U.S.C. § 1985(3) AND THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT OVER THE ISSUE.

In addition to asserting qualified immunity as to the Fourth Amendment and § 1983 conspiracy claims against him, Sheriff Morgan also asserted qualified immunity as to the 42 U.S.C. § 1985(3) claim against him. Although Morgan raised the qualified immunity defense in relation to the § 1985(3) conspiracy claim on appeal, the district court's ruling on the matter was affirmed summarily. Presumably this failure to address Sheriff Morgan's assertion of qualified immunity is based upon the Eleventh Circuit's position and respondents' argument that qualified immunity is not a defense to § 1985(3) claims. *See Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1814 (1993).

Although this Court has never addressed the specific question of whether qualified immunity is a viable defense to § 1985(3) claims, such a conclusion logically follows from the reasoning of *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). *Harlow* is founded upon the notion that " . . . public officials require . . . [qualified immunity] . . . to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id.* In its refusal to apply qualified immunity to § 1985(3) claims, the Eleventh Circuit reasons that the *evidentiary* obstacles presented by having to prove a defendant's discriminatory intention are so difficult to overcome that qualified immunity becomes unnecessary.

Burrell, 970 F.2d at 794. Such arguments are not persuasive. Without the protection of qualified immunity, even an innocent public official would be forced to plod his way through broad-ranging inquiries into his subjective motivations through discovery before he has an opportunity to prevail at summary judgment. This discovery is, in and of itself, an evil because it is "peculiarly disruptive of effective government." *Harlow*, 447 U.S. at 816-17. The public has a strong interest in preventing the disruptive influences that litigation creates, notwithstanding whether the government official ultimately prevails. *See Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991).

It appears that the Eleventh Circuit and the Ninth Circuit stand alone in their determination that qualified immunity has no application to § 1985(3) conspiracy claims. At least four other circuits which have addressed the issue have found qualified immunity relevant to § 1985(3) actions. *See Gallegos v. City and County of Denver*, 984 F.2d 358, 364 (10th Cir. 1993), *cert. denied*, 113 S.Ct. 2962 (1993); *Auriemma v. Rice*, 910 F.2d 1449, 1457-59 (7th Cir. 1990) (*en banc*), *cert. denied*, 111 S.Ct. 2796 (1991); *Mahoney v. Hankin*, 844 F.2d 64, 68 (2nd Cir. 1988); *Alexander v. Alexander*, 706 F.2d 751, 753 (6th Cir. 1983); *Hampton v. Hanrahan*, 600 F.2d 600, 635 (7th Cir. 1979), *cert. granted in part, judgment rev'd in part on other grounds*, 446 U.S. 754 (1980). The Ninth Circuit eliminated qualified immunity as an available defense to § 1985(3) conspiracy claims in *Gutierrez v. Municipal Court of Southeast Judicial Dist., County of Los Angeles*, 838 F.2d 1031, 1049-51 (9th Cir. 1988). *Contra, Walker v. Hoffman*, 583 F.2d 1073 (9th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

Further, taking the reasoning in *Burrell* and *Gutierrez* to their logical conclusion, any cause of action which presents a civil rights plaintiff with a difficult evidentiary obstacle should likewise be unfettered by qualified immunity: Fourteenth Amendment equal protection claims which have the same burden of proving discriminatory intent as § 1985(3), Fifth and Fourteenth Amendment due process claims which require proof of conduct that "shocks the conscience," and Eighth Amendment claims requiring proof of unnecessary and wanton infliction of pain. Plaintiffs who could not overcome the defense of qualified immunity on an equal protection claim would be advised to add a § 1985(3) claim in order to get to a jury. In fact, that is the position Sheriff Morgan finds himself in at this point: the equal protection claims against him have been stricken, *Swint*, 11 F.3d at 1031, yet he remains a defendant as to the plaintiffs' § 1985(3) conspiracy claims.

The writ of certiorari should be granted to bring the Eleventh Circuit in line with the reasoning of *Harlow* and the majority of other circuits which have addressed the question of whether the qualified immunity defense is applicable to § 1985(3) claims.

CONCLUSION

Based upon the foregoing, Petitioner Morgan respectfully requests certiorari be granted as to whether a supervisor's qualified immunity can be defeated based on inferred or imputed knowledge and as to whether qualified immunity is a viable defense to 42 U.S.C. § 1983(5) conspiracy claims. Allowing the opinion below to stand will encourage further erosion of the qualified immunity defense by the circuit courts of appeal. Public officials, especially supervisors, will routinely be denied qualified immunity because of their subordinates' misconduct in implementing the supervisor's constitutionally valid policies even though the supervisor had no actual knowledge of the misconduct. Thus, the phrase from *Anderson v. Creighton* referring to "information . . . possessed" by the public official becomes stripped of all meaning opening the door for *respondeat superior* liability under § 1983. 483 U.S. at 641. As a result, supervisors like Sheriff Morgan, especially in the risk-intensive field of law enforcement, will be encouraged to "err always on the side of caution" contrary to this Court's admonition in *Davis v. Scherer*, 468 U.S. 183, 196 (1984). Law enforcement supervisors will be forced to second guess and investigate behind their own officers even when they have no reason to suspect misconduct. Such distrust and micromanagement will not lend itself to effective law enforcement.

Additionally, petitioner respectfully requests that this Court resolve the conflict in the courts of appeal as to whether qualified immunity is available to a public official sued in his individual capacity under 42 U.S.C. § 1985(3).

If qualified immunity is to remain a viable protection for public officials, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Tom SWINT; Tony Spradley; Drecilla James and Jerome Lewis,

Plaintiffs-Appellees,

v.

The CITY OF WADLEY, ALABAMA; Freddie Morgan and Gregory Dendinger in their official and individual capacities; Chambers County Commission, Defendants-Appellants,

Chambers County Sheriff's Department, Defendant,

James C. Morgan, in his official and individual capacity, Defendant-Appellant.

No. 92-6574.

United States Court of Appeals,
Eleventh Circuit.

Nov. 3, 1993.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

CARNES, Circuit Judge:

This civil rights case, involving allegations of police misconduct, was filed by four citizens against the City of Wadley, Alabama, the Chambers County Commission, and three individual defendants: Wadley Police Chief Freddie Morgan, Officer Gregory Dendinger, and Chambers County Sheriff James C. Morgan. Before us is the

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

appeal of Chief Morgan, Officer Dendinger, and Sheriff Morgan from the district court's denial of their qualified immunity summary judgment motions. Also before us is the request by the City of Wadley and the Chambers County Commission that we exercise jurisdiction under either the collateral order or pendent appellate doctrines to review the district court's denial of their summary judgment motions. The City contends the district court should have held that the Chief of Police did not have final decisionmaking authority over the relevant actions, and thus the City was not liable for his conduct. Similarly, the County Commission contends the court should have held that under Alabama law the Sheriff was not the final repository of county law enforcement authority; and thus the County was not liable for his actions. The City, Chief Morgan, and Officer Dendinger also urge us to review, under either the collateral order pendent appellate jurisdiction doctrine, the district court's denial of their summary judgment motion as to the state law claims against them.

We affirm the district court's denial of the individual defendants' qualified immunity summary judgment motions insofar as the Fourth Amendment and equal protection claims are concerned, but reverse the denial as to the due process claims. We exercise our pendent appellate jurisdiction over and reverse the denial of the County Commission's summary judgment motion. We hold that jurisdiction to review the rulings on the denial of the other motions for summary judgment does not exist under the collateral order doctrine, and we decline to exercise pendent appellate jurisdiction to review those rulings.

I. BACKGROUND

A. STATEMENT OF FACTS

In considering the denial of a defendant's summary judgment motion, we are required to view the facts, which are drawn from the pleadings, affidavits, and depositions, in the light most favorable to the plaintiffs. *E.g., Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir.1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir.1990). Any qualified immunity defenses that do not result in summary judgment before trial may be renewed at trial, where the actual facts will be established. *Compare Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1567 n. 2 (11th Cir.1992) (non-majority opinion of Hatchett, J.) (dictum) *with id.* at 1579 n. 8 (dissenting opinion of Edmondson, J.) (dictum)[1] Thus, what we state as "facts" in this opinion for purposes of reviewing the rulings on the summary judgment motions may not be the actual facts. They are, however, the facts for present purposes, and we set them out below.

This lawsuit stemmed from two law enforcement raids on the Capri Club ("the Club"), a nightclub located in Chambers County, Alabama. Although outside any city limits, the Club is within the police jurisdiction of the City of Wadley, a community located in Randolph

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[1] No majority opinion was issued by the panel in *Adams*. Two of the panel members did concur in the judgment affirming the denial of summary judgment on qualified immunity grounds. Judge Edmondson dissented. The en banc court reversed, "[o]n reasoning set out in the dissenting opinion of Judge Edmondson." *Adams v. St. Lucie County Sheriff's Department*, 998 F.2d 923 (11th Cir.1993) (en banc).

County, Alabama. Plaintiffs Tom Swint and Tony Spradley are owners of the Club; plaintiff Drecilla James is a club employee who was present during both of the raids; Jerome Lewis is a Club patron who was present during the second raid. All four plaintiffs are black. The three individual defendants – Chief Morgan, Officer Dendinger, and Sheriff Morgan – are all white. Each was sued in both his official and individual capacities. The Chambers County Commission and the City of Wadley are the other defendants.

In response to complaints that drug transactions were being conducted in the Club, the Chambers County Sheriff's Department and the City of Wadley Police Department engaged in a preliminary narcotics investigation of the Club. This investigation culminated in a recommendation from Chambers County Sheriff's Investigator Timothy Birchfield to Sheriff Morgan for a raid on the Club. Sheriff Morgan "approved the narcotics investigation and operation at the Club."

The raid was conducted by the Chambers County Drug Task Force, consisting of units from the Chambers County Sheriff's Department and the police departments of the cities of Lafayette, Lanett, and Valley, Alabama. Joining the Task Force for this operation were representatives of the City of Wadley Police Department and the Alabama Alcoholic Beverage Control Board. The total strength assembled by the Task Force for the raid was 30 to 40 law enforcement officers. In accordance with the operation plan apparently devised by Investigator Birchfield, an undercover officer and a confidential informant entered the Club on December 14, 1990 while the other task force members remained out of sight.

While inside, the undercover officer was offered marijuana and crack cocaine for sale by a patron of the Club. After purchasing these drugs, the officer left the Club and signaled for the raid to begin.

Initial entry of the Club was made by the City of Lanett, Alabama SWAT team consisting of approximately eight officers. The team was dressed in black and at least some of the members wore ski masks to conceal their identities. Within 30 seconds of the SWAT team's entry, the other members of the task force entered. The person who had sold the undercover officer drugs was identified and arrested. The task force officers pointed their weapons at plaintiffs Spradely and James and others who were present. Participants in the raid searched the Club's cash register and door receipts, and some currency was confiscated from the door receipts. Persons inside the Club were prohibited from moving or leaving until the raid, which lasted one to one and one-half hours, was over. Those present were not allowed to go to the restroom. When on man asked for permission, Officer Dendinger replied, "Shut up, or I'll shut you up myself." When plaintiff James told Chief Morgan that she was so scared that she had to go to the restroom, he said no. Another officer also refused her request to use the Club's restroom facilities, telling her she would have to go behind the building. During this first raid, illegal liquor was seized by an Alabama Alcohol Beverage Control Board officer who participated in the raid, and several minors were found inside the Club. Only two people were arrested during this entire raid: the man who sold the undercover officer drugs; and that man's younger brother, a minor, who had in his possession some of the

marked money the undercover agent had paid for the drugs.

After the December 14, 1990 raid, additional narcotics-related complaints were received by the Chambers County Sheriff's Department. In response, Sheriff Morgan directed that Birchfield investigate activities at the Club to ascertain whether a second operation was required. Birchfield investigated and recommended another operation; Sheriff Morgan authorized it.

The second raid was conducted on March 29, 1991, and it was virtually identical in procedure to the first. Again, an undercover agent went inside first and purchased drugs. After the premises were secured this time, however, the task force participants could not find the man who had sold drugs to the undercover officer. During this second raid, law enforcement officials chambered rounds of ammunition into their weapons, pointed them, and ordered persons in the Club to get down on the floor. Some of those present in the Cub during this raid were searched, including plaintiff Lewis. During the process of being searched, Lewis was pushed outside the Club, grabbed, and shoved against a wall. After being searched, Lewis was forced to go back inside the Club until the raid was concluded. Another patron was pushed off a bar stool. Some of the employees, including plaintiff James, had guns held on them during this raid, which lasted from one to one and one-half hours. At one point, an officer, with his finger on the trigger, pointed a shotgun at Lewis' face. No one was arrested during or because of this second raid.

During one of the raids, an unidentified officer said they would be coming back and would not stop until the Club was closed. No other law enforcement operation of this nature had been conducted during Sheriff Morgan's twenty-one year tenure as Sheriff of Chambers County. Chief Morgan and Officer Dendinger personally participated in both raids. Sheriff Morgan was not physically present during either raid, but he authorized both of them.

B. COURSE OF PROCEEDINGS

The plaintiffs' complaint, which seeks declaratory, injunctive, and compensatory relief, avers the following four counts[2]:

> Count I: Deprivation of Civil Rights, 42 U.S.C. §§ 1981, 1983 and 1985 for violations of plaintiffs' rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments;
>
> Count II: Conspiracy to deny plaintiffs' constitutional rights;
>
> Count III: Pendent state claims alleging assault and false imprisonment;
>
> Count IV: Pendent state claims alleging negligence.

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[2] In the introduction to their complaint, plaintiffs refer to a violation of their rights guaranteed under the Thirteenth Amendment. However, plaintiffs indicated in a pretrial conference that they would not pursue the Thirteenth Amendment claim; the district court, therefore, regarded this claim as abandoned and declined to address it. So do we.

All the defendants moved to dismiss, and their motions were granted in part and denied in part by the district court. Citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the district court dismissed the 42 U.S.C. § 1981 claims against all defendants. The court dismissed on Eleventh Amendment grounds the claims against Sheriff Morgan in his official capacity to the extent plaintiffs seek money damages. The court also dismissed the complaint against the Chambers County Sheriff's Department. None of those dismissals is before us for review.

All remaining defendants filed motions for summary judgment. In response, the district court granted judgment against the plaintiffs as follow:

1. On Count I insofar as the plaintiff's claimed a right under the Sixth Amendment to be informed of the accusations against them;

2. On Count II insofar as the plaintiffs claimed a right to association, speech and movement;

3. On Counts III and IV as to the Chambers County Commission;

4. On Count III as to Sheriff Morgan;

5. On Count III as to the City on the claims of false imprisonment only; and

6. On Count IV as to Officer Dendinger.

In all other respects, the defendants' motions for summary judgment were denied.

II. DISCUSSION

A. THE INDIVIDUAL DEFENDANTS' APPEAL OF THE DENIAL OF SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS

1. *Qualified Immunity Law*

The district court denied the three individual defendants' motions for summary judgment on qualified immunity grounds. The denial of qualified immunity is a question of law to be reviewed *de novo*. *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir.1992). In addition, "when a defendant moves for summary judgment based on the doctrine of qualified immunity, the court must view the facts in the light most favorable to the plaintiff." *Id.* The rudiments of the qualified immunity defense are well established:

> When a plaintiff sues a municipal officer in the officer's individual capacity for alleged civil rights violations, the plaintiff seeks money damages directly from the individual officer. If sued "individually," a municipal officer may raise an affirmative defense of good faith, or "qualified," immunity.

Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir.1991) (citations omitted). The test for qualified immunity was announced by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982):

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818, 102 S.Ct. at 2738.

Although the cases sometimes refer to the doctrine of qualified "good faith" immunity, the test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. *Courson v. McMillian,* 939 F.2d 1479, 1487 (11th Cir.1991). "[W]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Hardin* 957 F.2d at 848. Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Courson,* 939 F.2d at 1487 (*quoting Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)).

In conducting the objective legal reasonableness inquiry, this Court has defined the following framework for analysis:

> In *Zeigler v. Jackson* [716 F.2d 847, 849 (11th Cir.1983)] this Court established a two-step analysis to be used in applying the *Harlow* test: the defendant government official must prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred," and then the burden shifts to the plaintiff to demonstrate that the defendant "violated clearly established constitutional law."

Sammons v. Taylor, 967 F.2d 1533, 1539 (11th Cir.1992). The plaintiffs do not contest that the individual defendants were acting within their discretionary authority when they authorized or participated in the two raids. Thus, the first step of the analysis is satisfied.

The dispute is over the second step of the analysis: whether the rights alleged to have been violated were "clearly established" law at the time of the action. The Supreme Court has revisited this question a number of times:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citations omitted). This Court has previously explained:

> [T]here are two questions of law that we must decide in completing the second step of the *Zeigler* analysis: ascertainment of the law that was clearly established at the time of the defendant's action, and a determination as to the existence of a genuine issue of fact as to whether the defendant engaged in conduct violative of the rights established by that clearly-established law.

Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir.1988). The *Rich* court elaborated on the "common situations" that can arise in connection with the "clearly established" inquiry:

> The parties can in a given case make factual showings regarding the acts or omissions of the defendants which create genuine fact issues as to precisely what the defendant's course of conduct was in the given situation. However, these factual disputes do not preclude a grant of summary judgment premised on a defendant's qualified immunity if the legal norms allegedly violated were not clearly established at the time of the challenged actions. Thus, in the context of a § 1983 case, summary judgment would be appropriate as a matter of law, notwithstanding factual disputes on the record regarding the defendant's conduct.

Id. at 1564-65. The Court went on to discuss the flip side of this coin:

> To complete the point made here, we also recognize that if the legal norms allegedly violated were as a matter of law clearly established at the appropriate time, a genuine fact issue as to what conduct the defendant engaged in would preclude a grant of summary judgment based upon qualified immunity. In this latter situation the denial or grant of summary judgment turns on the second question of law identified in *Mitchell* [*v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)], i.e., do the showings reveal a genuine issue of material fact as to whether the defendant's conduct violated the right accruing to the plaintiff under clearly established law.

Id. at 1565.

2. *The Constitutional Norms Relied Upon By Plaintiffs*

The district court granted defendants' summary judgment on qualified immunity grounds as to the First and Sixth Amendment claims, but denied it as to the Fourth Amendment, due process, and equal protection claims, concluding "that the law was clearly established in December, 1990, and in March, 1991" that the alleged conduct violated those constitutional provisions.

a. The Fourth Amendment Claims

The district court found that it was "clearly established . . . that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances. . . . " Indeed it was. Well before the events of December 1990 and March 1991, this Court observed:

> The basic premise of search and seizure doctrine is that searches undertaken without a warrant issued upon probable cause are "*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."

United States v. Alexander, 835 F.2d 1406, 1408 (11th Cir.1988) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). Long before the raids at issue in this case, the Supreme Court, summarizing preexisting law, noted that "[a]bsent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant." *Donovan v. Dewey*, 452 U.S. 594, 598 n. 6, 101 S.Ct. 2534,

2538 n. 6, 69 L.Ed.2d 262 (1981). The Court specifically added that "these same restrictions pertain when commercial property is searched for contraband or evidence of crime." *Id.* Our cases have stressed that:

> [o]nly in the face of "exigent circumstances," where obtaining a warrant would greatly compromise important law enforcement objectives, does the warrant requirement yield. When exigent circumstances coexist with probable cause, the Fourth Amendment has been held to permit warrantless searches and seizures.

United States v. Pantoja-Soto, 739 F.2d 1520, 1523 (11th Cir.1984) (citations omitted), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

Defendants argued before the district court that "[t]he search in the case here was pursuant to probable cause and exigent circumstance[s]. . . . " Probable cause, a pure question of law, "exists when under the 'totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir.) (en banc) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 299, 116 L.Ed.2d 243 (1991). In other words, "facts [which would] lead a reasonably cautious person to believe that the 'search will uncover evidence of a crime' " will support a finding of probable cause. *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir.1983) (quoting *United States v. Rojas*, 671 F.2d 159, 165 (5th Cir. Unit B 1982)).

Nonetheless, the question for purposes of the individual defendants' qualified immunity defense is not

whether probable cause actually existed. Instead, "[w]hen a law enforcement officer seeks summary judgment on the basis of qualified immunity, we only must ask whether, viewing the facts in a light favorable to the non-movant, there was *arguable* probable cause." *Moore v. Gwinnett County*, 967 F.2d 1495, 1497 (11th Cir.1992) (emphasis in original), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Thus, we determine "whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed." *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir.1990); *accord Moore*, 967 F.2d at 1497-98. In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . that in such cases those officials . . . should not be held personally liable." *Id.* at 641, 107 S.Ct. at 3039-40; *accord Von Stein*, 904 F.2d at 579.

Based on the record before us, read in a light favorable to the plaintiffs, we cannot conclude that the individual defendants had even arguable probable cause to conduct the extensive raids of the Club which included a search of the premises, the seizure of all employees, patrons, and owners present, and the search of some of those who were detained. Stated somewhat differently, law enforcement officers in the position of these individual defendants could not reasonably have concluded that adequate probable cause existed to justify the searches and seizures that occurred. Chief Morgan testified in deposition that approximately a month before the first

raid, he had received information from a reliable confidential informant regarding the sale of narcotics inside the Club. Chief Morgan noted that this source had previously assisted authorities in obtaining convictions of other suspects. According to Chief Morgan, the informant identified several individuals allegedly involved in the sale of drugs. Likewise, Sheriff Morgan testified that he relied on information from a reliable informant in authorizing the March 29, 1991 raid. However, none of those persons identified by these informants were owners or employees of the Club; therefore, the search of the Club's cash register and door receipts was presumptively unreasonable. Moreover, the defendants have offered no evidence that all of the patrons of the Club who were detained at gunpoint and randomly searched were previously identified as engaged in the narcotics trade, or that the defendants had any reason whatsoever to believe that all of the patrons were involved in illegal activity. Absent such evidence or reason to believe, there was not even arguable probable cause to seize and detain every patron and employee of the Club for an hour and a half and search many of those present.

Defendants direct our attention to the consummated drug transactions that preceded each of the raids. Immediately before each raid, an undercover agent did complete a single drug buy from one person inside the Club. There is no question that probable cause existed to arrest and search the narcotics peddler on each of the two occasions. Within minutes of the entry of the SWAT team and other members of the task force at the beginning of the December 14, 1990 raid, the drug seller was identified, arrested, and removed from the premises. After

entry during the March 29, 1991 raid, officers attempted in vain to identify and find the one who had sold drugs to the undercover officer a few minutes earlier. If that had been the extent of the intrusion on these two occasions, this would be a different case. But that was not the end of the intrusion. On the contrary, the officers proceeded to detain at gunpoint dozens of citizens for an hour and a half, search a number of them, and search the premises as well. In the process, the officers completely disrupted the business of the Club. All of this was done without even arguable probable cause to justify anything beyond the search and arrest of a single individual on each occasion.

Defendants have cited no authority that even suggests that the search and seizure of one suspect in a public place can be bootstrapped into probable cause for a broad-based search of the business establishment and its patrons. More than a decade before the raids in this case, the Supreme Court clearly established the constitutional impropriety of what was done in this case. In *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Illinois Bureau of Investigation obtained a search warrant authorizing the search of the Aurora Tap Tavern and of the person of the bartender. In the ensuing search, one officer proceeded to pat down each of the nine to thirteen customers in the tavern. In the course of the patdown of patron Ventura Ybarra, heroin was found. The Supreme Court reversed the resulting conviction on Fourth Amendment grounds with an observation that could have been penned for this case as well: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91, 100

S.Ct. at 342. The Fourth Amendment, declared the Court, affords "individualized protection":

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Id. Each citizen is "clothed with constitutional protection against an unreasonable search or an unreasonable seizure," *id.*, and does not shed that protection at the door of the Tap Tavern in Aurora, Illinois, or at the door of the Capri Club in Wadley, Alabama. Probable cause to arrest one suspect, and even probable cause to believe that a number of other or unidentified people had sold drugs in the establishment in the past, did not give the officers *carte blanche* to seize everyone who happened to be in the Club when the two raids took place.

We believe it was equally clear in December of 1990 that the arrest of the one person who had sold drugs to the undercover officer did not entitle the officers to search the entire premises in which he was located. The permissible scope of searches incident to arrests was defined by the Supreme Court in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969):

> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here [of the defendant's entire

> home subsequent to his arrest] went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area.

Id. at 768, 89 S.Ct. at 2043. The defendants had no warrant to search the Club and seize its occupants; they lacked even arguable probable cause to engage in such conduct; and their activities exceeded the bounds of a lawful search incident to an arrest. Under law that had been clearly established years before, the actions alleged to have occurred during the two raids violated the Fourth Amendment. No reasonable law enforcement officer in the circumstances presented here could have believed that probable cause existed to search the entire Club and seize all of its occupants.

Defendants place great weight on their contention that exigent circumstances justified the broad search and seizures that occurred during the raids on the Club. We have explained that "[t]he exigent circumstance doctrine provides that when probable cause has been established to believe that evidence will be removed or destroyed before a warrant can be obtained, a warrantless search and seizure can be justified." *United States v. Young*, 909 F.2d 442, 446 (11th Cir.1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 90, 116 L.Ed.2d 62 (1991). We need not address defendants' exigent circumstances argument, because it is well-settled that under this doctrine, "warrantless searches and seizures . . . [require that] both probable cause and exigent circumstances exists." *United States v.*

Burgos, 720 F.2d at 1525. Having concluded that the defendants lacked even arguable probable cause for anything beyond a search and seizure of the two suspects who had actually engaged in narcotics transactions, we find it unnecessary to decide whether a reasonable officer could have believed that sufficient exigent circumstances existed to excuse the warrant requirement if there had been probable cause to justify the actions that occurred.

Defendants argue there was no violation of plaintiffs' rights, because the two raids were administrative searches of the Club to which the Club owners had previously consented. Even in the context of administrative searches of business property, however, the Fourth Amendment limits warrantless searches: "[P]rior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property." *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262 (1981). While "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment," *id.* at 598, 101 S.Ct. at 2538, pretextual administrative searches do:

> [T]he Fourth Amendment protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the government. Inspections of commercial properly may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests. Similarly, warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable

> that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.

Id. at 599, 101 S.Ct. at 2538 (citations omitted) (emphasis in original). Thus, where an act authorizing administrative inspections "fails to tailor the scope and frequency of such administrative inspections to the particular" governmental concern, and "does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search," a search warrant will be required. *Id.* at 601, 101 S.Ct. at 2539 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (holding that absent consent a warrant was constitutionally required in order to conduct administrative inspections under § 8(a) of OSHA)).

The facts viewed favorably to plaintiffs simply will not support an administrative search theory. Administrative inspections conducted on the Club and its predecessor establishment both before and after the two raids at issue in this case were accomplished without the massive show of force and excessive intrusion witnessed in the December 1990 and March 1991 raids. Moreover, during the two raids the officers did not simply search for violations of the liquor laws by the establishment; instead, a number of people were searched for evidence of their violation of drug laws, searches to which they did not consent as part of any regulatory scheme. No reasonable officer in the defendants' position could have believed that these were lawful, warrantless administrative searches.

Sheriff Morgan advances another argument on the question of whether a genuine issue of fact exists as to whether he "engaged in conduct violative of the rights established by . . . clearly-established law." *Rich*, 841 F.2d at 1564. Although Sheriff Morgan acknowledges that he authorized both of the raids on the Club, he nonetheless contends that he could not have violated plaintiffs' rights because he was not personally involved in conducting the raids. According to the Sheriff, "the focus must center on the actions taken by [him] and the information he possessed in taking those actions." This argument fails for at least two reasons. First, although § 1983 does require proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation, "[p]ersonal participation . . . is only one of several ways to establish the requisite causal connection." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir.1986); *see also Sims v. Adams*, 537 F.2d 829, 831 (5th Cir.1976). Interpreting the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), this Court has observed that "it is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Thus, personal participation is not the *sine qua non* for Sheriff Morgan to be found personally liable under § 1983. "[L]iability may be imposed due to the existence of an improper policy or from the absence of a policy." *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir.1991) (summarizing preexisting law);

see also Zatler, 802 F.2d at 402 ("[A]ny alleged failure to adopt adequate policies for inmate protection must amount to a breach of [defendant's] duty and must evidence reckless disregard or deliberate indifference to [plaintiff's] constitutional rights.").

Second, and equally compelling, there were *two* raids in this case during which allegedly unconstitutional conduct occurred. Sheriff Morgan bases his claim to qualified immunity on his lack of personal involvement in and his lack of knowledge as to the details regarding the conduct of both raids. Citing this Court's opinion in *Hardin v. Hayes*, 957 F.2d 845 (11th Cir.1992), Sheriff Morgan urges us to focus on the information he possessed at the time he authorized the raids. We do so, but we cannot ignore the stark factual distinction between *Hardin* and the present case: In *Hardin* there was one suicide; in this case there were two raids. Indeed, at oral argument, Sheriff Morgan's counsel conceded that after the first raid, Sheriff Morgan was debriefed on how the raid had been conducted. Counsel further acknowledged that what happened at the second raid was materially identical to the events of the first raid. Thus, even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better.

Similarly, even if Chief Morgan and Officer Dendinger had not been fully aware of the Task Force's plan of attack before the first raid, as participants in the first raid they had ample opportunity to determine before the

second raid was conducted whether the first had comported with constitutional requirements. Upon learning of the manner in which the first raid was conducted, reasonable law enforcement officials would have been on notice that clearly established Fourth Amendment rights had been violated. Willingness to engage in the second raid demonstrated deliberate indifference to those rights, and it reflected accession to and adoption of the policies and procedures employed.

We hold that the law was clearly established in December of 1990 and March of 1991 that the Fourth Amendment proscribed the alleged conduct that law enforcement officials, including the individual defendants, engaged in in connection with the raids on the Club. Finding that the plaintiffs have, at a minimum, raised a genuine issue of material fact as to whether these defendants engaged in such conduct, we conclude that the district court properly denied the defendants' motions for summary judgment on qualified immunity grounds as to the Fourth Amendment claims.

b. The Equal Protection Clause Claims

The district court also held that " 'the equal protection right to be free from intentional racial discrimination' was clearly established," and found "sufficient evidence [adduced by plaintiffs] to create a genuine issue of material fact as to whether the raids may have been racially motivated." The court specifically pointed to: the statement of Officer Dendinger to Mattie Staples regarding the intention to close the Club down because of the

race of the owners and patrons; Sheriff Morgan's deposition testimony that the black-owned Club was the only one raided in his twenty-one years as sheriff; and evidence of a higher incident of DUI offenses for blacks than whites in the vicinity of the Club. The court acknowledged that this evidence had "mixed implications," but held that it was sufficient to raise triable issues of fact.

Defendants do not challenge the district court's holding that at the time of the raids the right to be protected from intentional racial discrimination in law enforcement was clearly established. Instead, they argue that summary judgment should have been granted because there was no genuine issue of material fact that they engaged in such discrimination. Based on our review of the record, we agree with the district court that a genuine issue of material fact does exist about whether the defendants engaged in intentional racial discrimination in authorizing or participating in the raids. The district court properly denied the summary judgment motions as to the equal protection claims.

c. The Due Process Clause Claims

The district court denied the individual defendants' qualified immunity motions as to the due process claims. We conclude that it erred in doing so.

To the extent that the due process claims are concerned with the use of excessive force, *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) forecloses any contention that the law was clearly established

in 1990 and 1991 that use of excessive force violated the Due Process Clause. In *Graham*, the Supreme Court held:

> *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Id. at 395, 109 S.Ct. at 1871 (emphasis in original). This Court has recently joined the First, Sixth and Ninth Circuits in purporting to narrow the scope of *Graham*, by holding "that a non-seizure Fourteenth Amendment substantive due process claim of excessive force survives *Graham*." *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir.1993). However, our 1993 decision in *Wilson* came two years too late to establish the law at the time of the two raids in this case. At the time of these raids, the law was not clearly established that excessive force in connection with a search violated not only the Fourth Amendment but also the Due Process Clause.

The complaint suggests that plaintiffs also contend that due process liberty and property rights were violated by a deliberate attempt of the defendants to drive the Club out of business through pretextual law enforcement raids. Plaintiffs rely on a substantially analogous case in which the Ninth Circuit upheld a jury verdict on a § 1983 action based, in part, on an alleged due process violation. *Benigni v. City of Hemet*, 879 F.2d 473 (9th Cir.1988). In *Benigni*, the plaintiff owned a restaurant and bar and claimed that constant police harassment of his business and customers forced him to sell the business at a loss.

The Ninth Circuit found that "[t]he due process clause protects a liberty or property interest in pursuing the 'common occupations or professions of life.' " *Id.* at 478 (quoting *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796 (1957) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.")).

Under qualified immunity analysis, the question is whether it was *clearly established* at the time of the raids that the Due Process Clause proscribed attempts by law enforcement to force citizens out of business through the use of repeated and improperly motivated raids of their business establishments. It may have been in the Ninth Circuit by virtue of the *Benigni* decision, but the courts of appeals generally and this Circuit in particular have not addressed the specific question involved. Plaintiffs' counsel conceded as much at oral argument when he stated that he had located no authority that clearly established on these facts a due process right that is separate and distinct from an equal protection right. Because such a due process right was not clearly established at the time of the raids in this case, Sheriff Morgan, Chief Morgan and Officer Dendinger are entitled to qualified immunity on the due process claims. Qualified immunity applies to monetary damages relief, but not to declaratory and injunctive relief. *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir.1993). Therefore, the summary judgment motions of the three individual defendants should have been granted as to the due process claims to the extent plaintiffs seek monetary damages.

3. *Summary*

We hold that the individual defendants in this case have established the defense of qualified immunity as to plaintiffs' due process claims, but not as to the Fourth Amendment and equal protection claims. Accordingly, their summary judgment motions were properly denied, except as to the due process claims. Judgment should have been entered for the defendants on the monetary damages part of the due process claims.

B. THE COUNTY COMMISSION'S APPEAL

1. *The Jurisdiction Issue*

The denial of a motion of summary judgment generally is not a final judgment for purposes of appellate jurisdiction. However, an exception exists where the summary judgment motion is based on a claim of qualified immunity "to the extent that [the denial] turns on an issue of law. . . . " *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817; *see McDaniel v. Woodard*, 886 F.2d 311, 313 (11th Cir. 1989). That is why we reviewed the order denying the summary judgment motions of the individual defendants; those motions were based on the qualified immunity doctrine. Of course, the mere fact that a district court's order includes a denial of qualified immunity does not mean that all issues addressed in that order are immediately appealable. To be appealable the parts of a summary judgment order addressing other issues must either independently meet the requirements of the *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949) test; or, we must be persuaded

to exercise our discretionary pendent appellate jurisdiction over them. Because the County Commission's summary judgment motion was not based upon the qualified immunity doctrine, the exception that permits interlocutory appeals of qualified immunity issues is inapplicable. Instead, the County Commission argues the *Cohen* collateral order doctrine and, alternatively, seeks to invoke our discretionary pendent appellate jurisdiction power.

a. *The Cohen* Test

To satisfy *Cohen*, an order must: (i) "conclusively determine the disputed question," (ii) "resolve an important issue completely separate from the merits of the action," and (iii) "be effectively unreviewable on appeal from a final judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985). Applying this test to the present case, it is readily apparent that the *Cohen* standard is not met because, for one thing, the question of whether the County may be held liable for the Sheriff's law enforcement actions is reviewable on appeal from a final judgment. In reaching this conclusion, we reject the County Commission's attempt to recast the third component of the *Cohen* test as an inquiry into whether the Commission's " 'right' to forego litigation" has been denied. Such a formulation would effectively eviscerate the *Cohen* test, because many of the erroneous legal rulings of a district court would constitute a denial of a party's "right" to forego litigation, thereby entitling that party to take an interlocutory appeal. The *Cohen* Court could not have intended such a result.

b. Pendent Appellate Jurisdiction

While the doctrine of pendent appellate jurisdiction has received mixed reviews in the courts of appeals, we have given it our blessing in several cases including *Schmelz v. Monroe County*, 954 F.2d 1540, 1542-43 (11th Cir.1992) and *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d at 1508-09.[3] In considering the question of pendent jurisdiction over an Eleventh Amendment immunity defense, the *Stewart* court found that "[p]endent jurisdiction is properly exercised over nonappealable decisions of the district court when the reviewing court already has jurisdiction over one issue in the case." *Stewart*, 908 F.2d at 1509 (quoting 9 *Moore's Federal Practice*, ¶ 110.25 ("once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done")); *see also Schmelz*, 954 F.2d at 1543 (pendent appellate jurisdiction "is based on concerns for judicial economy"); *but see Natale v. Town of Ridgefield*, 927 F.2d 101, 104 (2nd Cir.1991) ("Only in exceptional circumstances should litigants, over whom this Court cannot ordinarily exercise jurisdiction, be permitted to ride on the jurisdictional coattails of another party."). We have stated repeatedly that whether to exercise pendent appellate jurisdiction is

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[3] *See also Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563-64 (11th Cir.1993); *Andres v. Employees' Retirement Plan*, 938 F.2d 1245, 1247-48 (11th Cir.1991); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir.1991); *Broughton v. Courtney*, 861 F.2d 639, 641 n. 1 (11th Cir.1988); *Western Electric Co. v. Milgo Electronic Corp.*, 568 F.2d 1203, 1208 (5th Cir.), *cert. denied*, 439 U.S. 895, 99 S.Ct. 255, 58 L.Ed.2d 241 (1978); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir.), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

discretionary. *See, e.g., Akin v. PAFEC Ltd.* 991 F.2d 1550, 1563-64 (11th Cir.1993) (declining to exercise discretion under the pendent appellate jurisdiction doctrine to consider objections to the district court's ruling on plaintiff's untimely jury demand); *Crymes,* 923 F.2d at 1485 & n.4 (declining to "delineat[e] . . . the scope of our discretion to exercise jurisdiction over issues pendant to an interlocutory appeal from a denial of absolute immunity"). For reasons of judicial economy, we choose to exercise our pendent jurisdiction in this instance as we did in the *Stewart* and *Schmelz* cases. If the County Commission is correct about the merits in its appeal, reviewing the district court's order would put an end to the entire case against the County, because there are no pendent state law claims against it.

2. *The Merits of the County Commission's Appeal*

The County Commission correctly notes that § 1983 liability may not be grounded in a theory of *respondeat superior.* The Supreme Court so held in *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 694 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). A city or county government may be subjected to § 1983 liability, however, for the acts of an official who "possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur v. Cincinnati,* 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). A county may be liable under § 1983 just as a city may be. *See, e.g., Parker v. Williams,* 862 F.2d 1471, 1477 (11th Cir.1989).

This Court has found it "well established that a municipality may be held liable under § 1983 only when

the deprivation at issue was undertaken pursuant to [municipal] 'custom' or 'policy.' " *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479 (11th Cir. 1991). The *Brown* court further noted that the policy or custom need not have been put in place by the municipality's legislative body. Rather, "a municipal official who has 'final policymaking authority' in a certain area of the city's business may by his or her action subject the government to § 1983 liability when the challenged action falls within that authority." *Id.* at 1480 (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988) and *Pembaur*, 475 U.S. at 481, 106 S.Ct. at 1299); *see also Mandel v. Doe*, 888 F.2d 783, 792-93 (11th Cir.1989). "Whether a particular official has final policymaking authority is a question of state law." *Brown*, 923 F.2d at 1480 (citing *Jett*, 491 U.S. at 737, 109 S.Ct. at 2723).

The Alabama Supreme Court has held that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under a theory of respondeat superior." *Parker v. Amerson*, 519 So.2d 442, 442 (Ala.1987). As the Alabama Court observed, the decision of the Alabama Constitutional Convention of 1901 to make county sheriffs executive officers of the state was a response to the "[t]he failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism." *Id.* at 443. This Court, however, found in *Parker v. Williams*, 862 F.2d 1471 (11th Cir.1989), that the fact that an Alabama sheriff "works" for the state does not answer the question of whose policy he implements when he takes action. 862 F.2d at 1478. As *Parker* teaches, "[t]he pivotal point is whether [Sheriff Morgan] was exercising county power

with final authority" when he authorized the law enforcement raids in this case. *Id.*

In *Parker*, liability was imposed on the county by virtue of the sheriff's hiring decisions relating to the county jail. This Court found that based on Alabama statutes, "Alabama counties and their sheriffs maintain their county jails in partnership," *Id.* at 1478-79. The Commission argues that there is no such law enforcement partnership between Alabama counties and their sheriffs. It points out that under Alabama law it is:

> the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.

Ala. Code § 36-22-3(4). The Commission contends that no similar law enforcement duty or authority has been bestowed upon the county itself. We agree. Plaintiffs have not cited us to any statutes or decisions indicating that Alabama counties, and their governing commissions, have law enforcement authority or duties. Because Alabama counties are "authorized to do only those things permitted or directed by the legislature of Alabama." *Lockridge v. Etowah County Comm'n*, 460 So.2d 1361, 1363 (Ala. Civ.App.1984), and because the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county. At least three Alabama district courts that have addressed this issue have reached the same conclusion: *Forehand v.*

Roberts, No. CV-92-A-601-N, slip op. at 2-3 (M.D.Ala. Aug. 11, 1992) (Albritton, J.); *Smith v. Arndt*, No. CV-92-H-1227-NE, slip op. at 2-3 (N.D.Ala. July 14, 1992) (Hancock, Jr.); and *Sanders v. Miller*, No. CV-91-N-2804-NE, slip op. at 4-7 (N.D.Ala. Apr. 13, 1992) (Nelson, J.). Each of those district courts found that unlike the jail function identified in *Parker v. Williams*, there is no law enforcement "partnership" between Alabama counties and their sheriffs. We hold that Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none. Therefore, the County Commission is not liable for the Sheriff's law enforcement actions under 42 U.S.C. § 1983, and it is entitled to summary judgment on the § 1983 claims.

Our holding that Sheriff Morgan is not the final law enforcement decisionmaker for Chambers County also compels us to conclude that the Commission cannot be held liable under 42 U.S.C. § 1985(3), either. The elements of a cause of action under § 1985(3) are well established: a conspiracy for the purpose of denying any person or class of persons equal protection; an act in furtherance of the conspiracy; and an injury to a person, his property, or the deprivation of any right or privilege belonging to citizens of the United States. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 793-94 (11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1814, 123 L.Ed.2d 445 (1993). We have previously observed that "[t]he language of Section 1985 which requires an intent to deprive one of equal protection or equal privileges and immunities means that there must be some racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Byrd v. Clark*, 783 F.2d 1002, 1007-08

(11th Cir.1986). As with § 1983, the theory of *respondeat superior* will not support liability under § 1985(3). *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). Instead, a plaintiff must allege and prove each defendant's participation in the conspiracy, or a policy or custom of a municipal defendant that is causally related to the conspiracy. *See, e.g., Arnold v. Board of Educ. of Esambia County*, 880 F.2d 305, 318 (11th Cir.1989) (plaintiff failed to "allege any school board act from which the school board's participation in the conspiracy may be inferred").

Plaintiffs in the present case have shown no facts to establish the County Commission's involvement in a § 1985(3) conspiracy. There is no evidence in the record which links the Commission or any of its members to the alleged civil rights violations. Because the law enforcement actions and policies of Sheriff Morgan cannot be imputed to the County Commission, there exists no genuine issue of material fact about the Commission's involvement in a conspiracy to deprive the plaintiffs of their civil rights. It had no such involvement. We hold, therefore, that the Commission is also entitled to summary judgment on the § 1985(3) claims.

C. THE CITY'S APPEAL

1. *The Federal Claims*

The City seeks review of the denial of its summary judgment motion on the federal civil rights claims. The City's argument parallels the County Commission's: Chief Morgan was not the final decisionmaker for City law enforcement authority because the "City defendants

had no authority" over the conduct of the two raids. The focus, however, is not on whether Chief Morgan exercised authority over the conduct of the raid, but rather on whether his participation in the raids, by virtue of his position and authority within the City, put the City's imprimatur on the unconstitutional conduct.

The district court did not expressly decide the issue of whether Chief Morgan exercised final policymaking authority in the law enforcement area for the City. The court noted only that the City could "be held liable on Counts I and II . . . for Chief Morgan's decision to participate in the allegedly illegal raids of the Capri Club under Section 1983 *If* Chief Morgan is the final policy-maker for the City in the area of the law enforcement" (emphasis added). However, the court declined to grant the City summary judgment "without some assertion that the Plaintiffs cannot prove that Chief Morgan was the final policy-maker in this area."

The City's appeal of the district court's action does not meet the requirements of the *Cohen* collateral order test, because the order does not conclusively determine the disputed question, and the issue is not unreviewable after final judgment. We also decline to exercise our discretionary pendent appellate jurisdiction, because of the state of the record on the issue. Relying on the Supreme Court's decisions in *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), we have previously explained the process required to assess a claim of

municipal liability based on a municipal official allegedly acting as a final policymaker:

> Under this theory of municipal liability, the first step of the inquiry is to identify those individuals whose decisions represent the official policy of the local governmental unit. As already discussed, this is a question of law to be resolved by the trial court judge. In making this determination, the court should examine not only the relevant positive law, including ordinances, rules and regulations, *but also the relevant customs and practices having the force of law.*

Mandel v. Doe, 888 F.2d 783, 793 (11th Cir. 1989) (citations omitted) (emphasis added). In this case, there is no evidence in the record concerning "the relevant customs and practices having the force of law" which would define the distribution of law enforcement authority between the City and Chief Morgan. Indeed, the district court noted that the parties had not even briefed this issue before it. In light of this significant gap in the record, we will not exercise pendent appellate jurisdiction over the City's appeal.

2. *The Pendent State Law Claims*

In the aftermath of the district court's orders, the status of the state law claims is as follows:

1. Against Chambers County Commission: no surviving state law claims.
2. Against Sheriff Morgan: no surviving state law claims.
3. Against the City of Wadley: Count III (assault only) and Count IV (negligence)

relating to the March, 1991 raid are the only surviving state law claims.

4. Against Chief Morgan: Count III (assault and false imprisonment) and Count IV (negligence) are surviving state law claims.

5. Against Officer Dendinger: Count III (assault and false imprisonment) is the only surviving state law claim.

The City, joined by Chief Morgan and Officer Dendinger, urge this Court to exercise pendent jurisdiction over the district court's denial of summary judgment on these state law claims. We decline to do so. Each of the three defendants against whom state claims survive must proceed to trial on the federal claims anyway. This trial will necessarily include presentation of evidence bearing directly on the state as well as the federal claims. Therefore, judicial economy concerns are not sufficiently implicated to justify use of pendent appellate jurisdiction. In reaching this conclusion, of course, we intimate no view as to the merits of these claims.

III. CONCLUSION

As to the district court's order denying the qualified immunity summary judgment motions of Sheriff Morgan, Chief Morgan, and Officer Dendinger: we AFFIRM that denial insofar as the Fourth Amendment and equal protection claims are concerned; and, we REVERSE that denial insofar as the due process claims for monetary damages are concerned.

We REVERSE the district court's denial of the Chambers County Commission's motion for summary judgment. We hold that because the actions and policies of Sheriff Morgan cannot be imputed to the County Commission, and because the plaintiffs have failed to offer evidence to establish the involvement of the Commission or any of its members in the alleged violations, the Commission is entitled to summary judgment on all the federal claims. Therefore, summary judgment in favor of the County Commission on Counts I and II of the complaint is due to be granted.

We decline to exercise jurisdiction over the City's appeal of the district court's denial of the City's motion for summary judgment. Our decision here is not meant to foreclose further development of the facts and consideration by the district court of whether Chief Morgan was the final law enforcement decisionmaker for the City at the time of the raids.

We also decline to exercise jurisdiction over the appeals of the City, Chief Morgan, and Officer Dendinger concerning the district court's denial of summary judgment to those defendants on the pendent state law claims.

Accordingly, we AFFIRM in part, REVERSE in part, and REMAND this case for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL,	)	
Plaintiffs,	)	CIVIL ACTION NO.
VS.	)	91V-965-E
THE CITY OF WADLEY, ALABAMA; ET AL,	)	
Defendants.	)	

ORDER

(Filed Jun. 2, 1992)

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED by this court that Defendants' Motions for Summary Judgment filed herein December 18, 1991, and January 27, 1992, are hereby GRANTED to the extent that:

1. Count I is DISMISSED *only* insofar as the Plaintiffs claim a right under the Sixth Amendment to be informed of the accusation against them.

2. Count II is DISMISSED *only* insofar as the Plaintiffs claim a right to association, speech, and movement.

3. Counts III and IV are DISMISSED as to Defendant, Chambers County Commission.

4. Count III is DISMISSED as to Defendant, James C. Morgan.

5. Count III is DISMISSED as to Defendant, City of Wadley, as to the claim of false imprisonment only.

6. Count IV is DISMISSED as to Defendant, Gregory Dendinger.

Said Motions for Summary Judgment are DENIED in all other respects.[1]

DONE this 2nd day of June, 1992.

/s/ R.E. Varner
R. E. VARNER
UNITED STATES
DISTRICT JUDGE

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[1] For clarification, the only claims remaining for trial are: ***Federal Claims:*** Counts I and II, insofar as the Plaintiffs claim violations of their right to be free from unreasonable search and seizure under the Fourth Amendment, to be accorded due process of law under the Fifth and Fourteenth Amendments, and to be accorded equal protection of the laws under the Fourteenth Amendment remain to be tried (a) against Defendants, Chambers County Commission and City of Wadley; (b) against James Morgan in his **individual** capacity; (c) against James Morgan in his **official** capacity only insofar as injunctive relief is sought; and (d) against Defendants Dendinger and Freddie Morgan in both their **official** and **individual** capacities. ***State Claims:*** Count III remains to be tried (a) against Defendants Dendinger and Freddie Morgan; and (b) against Defendant City of Wadley only for the assault claim allegedly occurring in March, 1991. Count IV remains to be tried (a) against Defendant Freddie Morgan and (b) against Defendant City of Wadley as to the alleged raid in March, 1991.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, VS. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	)	CIVIL ACTION NO. 91V-965-E

OPINION

(Filed Jun. 2, 1992)

This cause is now before the Court on Defendants' Motions for Summary Judgment filed herein December 18, 1991, and January 27, 1992, and on the materials and briefs submitted in support of and in opposition thereto. This Court has jurisdiction of this cause pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

This case arises from two raids conducted by law enforcement officers in December, 1990, and in March, 1991, of The Capri Club, a night club located in Chambers County, Alabama, and owned and operated by Plaintiffs Tom Swint and Tony Spradley. At the time of the raids, Plaintiff Drecilla James was the manager of the club, and Plaintiff Jerome Lewis was a patron of the club.

During the two raids, officers allegedly entered the club with their guns drawn and kept these guns pointed at those present while they searched the premises and also searched, threatened, and questioned patrons. Some

of the officers wore ski masks and were dressed in black. The Plaintiffs contend that the raids were racially motivated and were not supported by either an arrest warrant or a search warrant. All of the Plaintiffs are black.

In their four-count Complaint, the Plaintiffs allege violations of their constitutional rights under 42 U.S.C. §§ 1983 and 1985 in Counts I and II;[1] allege a pendent State law claim for assault and false imprisonment in Count III; and allege a pendent State law claim for negligence in hiring, training, and supervising employees in Count IV. After this Court's ruling of January 22, 1992, on motions to dismiss, the remaining Defendants include the City of Wadley, the Chambers County Commission, Freddie Morgan, Gregory Dendinger, and James Morgan.[2]

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[1] The Plaintiffs allege violations of the Fourth, Fifth, Sixth, Thirteenth and Fourteenth Amendments. (Complaint, ¶ 26). In Count I, they allege a violation of the **Fourth** Amendment right to be free from unreasonable searches or detentions; of the **Sixth** Amendment right to be informed of the accusation against them; of the **Fifth** and **Fourteenth** Amendments "not to be deprived of liberty or property without due process of law"; and the **Fourteenth** Amendment right to equal protection. (Complaint, Count I). In Count II, they allege a conspiracy to deprive them of their rights "of free association and freedom of movement and speech," of due process of law, of equal protection, and of "the right to be free of racially discriminatory conduct." (Complaint, Count II).

[2] The Plaintiffs also alleged violations under 42 U.S.C. § 1981, but all claims under this section were dismissed by this Court's Order of January 22, 1992. Also dismissed in that Order were Defendant Chambers County Sheriff's Department; Counts I and II as to Defendant James C. Morgan to the extent that he is sued in his official capacity for damages; Count IV as to Defendant James C. Morgan; and Counts III and IV as to

Undisputed Facts.[3] On December 14, 1990, and on March 29, 1991, law enforcement officers from the City of Wadley, Alabama, and from various Alabama counties, including Chambers County, raided The Capri Club in Chambers County as part of a joint narcotics operations conducted by the Chambers County Drug Task Force. (County's Ex. A, Birchfield Affidavit; County's Ex. D, James Morgan Affidavit; P Ex. D to County's Motion, Lewis Deposition, at 48). These raids were conducted without a search warrant or an arrest warrant. (County's Ex. A, Birchfield Affidavit; Freddie Morgan Deposition, at 48).

The Task Force's plan for each raid was for an undercover officer to go into the club and to attempt a buy from a suspected drug dealer. (County's Ex. A, Birchfield affidavit, ¶ 11) If the officer was able to make a buy, he would alert the Task Force after he left the club. **Id.**, at ¶¶ 13, 23-24; Freddie Morgan deposition, at 69-70. The first team of officers would then enter the club to control the crowd. (County's Ex. A, Birchfield affidavit, ¶¶ 14, 24; Freddie Morgan deposition, at 55, 64). This first team, a SWAT team from Lanett, Alabama, was dressed in black,

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Defendant City of Wadley to the extent of the alleged December, 1990 raid. The Court also struck from the Complaint the punitive damages demand against the Municipal Defendants City of Wadley and Chambers County Commission.

[3] Unless otherwise noted, all references to exhibits of the Chambers County Defendants will be designated "County's Ex."; all references to exhibits of the City Defendants will be designated "City's Ex."; and all references to Plaintiffs' exhibits will be designated either "P Ex. to County's Motion" or "P Ex. to City's Motion".

wore ski masks, and carried shotguns. (County's Ex. A, Birchfield affidavit, ¶¶ 14, 24). Within 30 seconds or so of their entry, other officers would enter. (County's Ex. A, Birchfield affidavit, ¶¶ 17, 24; Freddie Morgan deposition, at 65). Freddie Morgan, the Chief of Police of the City of Wadley, who participated in the operation, described the plan: Investigator Birchfield would wait outside the club for a signal from the undercover officer that a buy had been made, and then "he would tell everybody else, you know, to come on, and they would take the – the sellers from the club." (Freddie Morgan deposition, at 54-55).

When this plan was executed at the first raid in December, 1990, and undercover agent purchased marijuana and crack cocaine from suspect Tony Battle. (County's Ex. A, Birchfield affidavit, ¶ 13). Mr. Battle was arrested that night.[4] Some 30 to 40 officers participated in

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[4] A factual dispute exists as to whether Tony Battle was arrested inside the club or outside the club on December 14, 1990. According to Investigator Birchfield's affidavit, after the SWAT team entered the club, the undercover agent went back inside and identified Tony Battle as the person who sold him the marijuana and cocaine. (County's Ex. A, Birchfield affidavit, ¶ 17). Plaintiff Spradley disputes that Tony Battle was in the club on the night of December 14, 1990. (P Ex. B to County's Motion, Spradley deposition, at 305-08). Moreover, Investigator Birchfield attests that Battle's younger brother, a minor, was arrested for having some of the marked money the undercover agent gave Battle when he made the buy. (County's Ex. A, Birchfield affidavit, ¶ 17). According to Plaintiff Spradley, the officers seized the marked bills from the club's door receipts box, which box was used for collecting an admissions charge as patrons entered the club that night. (P Ex. B to County's Motion, Spradley deposition, at 311-13).

the operation. (County's Ex. A, Birchfield affidavit, ¶ 17). Although the undercover agent at the second raid in March, 1991, was also able to purchase crack cocaine, no arrests occurred because the agent was unable to identify the person who sold him the cocaine. (County's Ex. A, Birchfield affidavit, ¶ 24).

Investigator Timothy Birchfield of the Chambers County Sheriff's Department obtained approval for conducting the two raids from Defendant James Morgan, Sheriff of Chambers County (**hereafter Sheriff Morgan**). (County's Ex. A, Birchfield Affidavit; County's Ex. D, James Morgan Affidavit). Although Sheriff Morgan approved the raids, he did not personally participate in them. (County's Ex. D, James Morgan Affidavit; James Morgan deposition, 12-13; 37-39). He deputized officers from other counties so that they could participate. (James Morgan deposition, pp. 13-15) He knew that the two raids occurred "because of the suspected sales of illegal narcotics inside the Club Capri and the actual purchase of such drugs by undercover officers prior to each raid." (County's Ex. D, James Morgan affidavit, ¶ 10). "With regards to drug operations," his policy was:

> "to raid an establishment only if accompanied by a search warrant or with probable cause. If an informant or other reliable information leads us to believe that illegal drug activities are taking place in an establishment, an undercover officer is usually sent in to attempt to make a drug buy. It is common practice that if a drug buy takes place, a drug raid may take place to arrest those responsible." (County's Ex. D, Morgan Affidavit, ¶ 4).

Investigator Birchfield also understood the Sheriff's policy to be that his officers not "initiate any narcotics raid on a business establishment or home unless there is either a search warrant or a drug buy." (County's Ex. A, Birchfield Affidavit, ¶ 26).

Defendants Freddie Morgan, the Chief of Police of the City of Wadley **hereafter Chief Morgan**), and Gregory Dendinger, a police officer with the City of Wadley personally participated in the two raids. (Freddie Morgan deposition, at 56). Chief Morgan testified that the "entry team" carried shotguns on both occasions. (Freddie Morgan Deposition, p. 75). During the second raid, he observed "a certain number of patrons who were . . . frisked and their money looked through." (Freddie Morgan Deposition, p. 77).

Chief Morgan also testified that about 30 days before the first raid, his department received information from a confidential informant that narcotics were being sold in the club. (Freddie Morgan Deposition, at 36-37). The suspected drug dealers did not include any of the Plaintiffs, the owners or employees of the club, or the Plaintiff patron, Jerome Lewis. **Id.**, at 41, 42, 77-85.[5] Investigator

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[5] During Chief Morgan's deposition, his attorney would not allow him to answer the Plaintiffs' question of whether Plaintiff Jerome Lewis, a patron of the Club, was a suspected drug dealer at the time of the raids. (Freddie Morgan Deposition, at 77-85). At the pretrial conference on May 12, 1992, counsel for the Plaintiffs informed this Court that he had reserved that question, and this Court ordered the defense to answer the question. This Court will accept for purposes of summary judgment that Jerome Lewis was not a suspected drug dealer because the defense would not allow Chief Morgan to

Birchfield testified that, during 1990 and after the first raid, the Chambers County Sheriff's Department received numerous complaints from citizens who suspected that drugs were being sold in the club. (County's Ex. A, Birchfield affidavit, ¶ 9).[6] Sheriff Morgan testified that in the second operation, he received information from a reliable informant that drugs were being dealt at the Capri Club. (James Morgan deposition, pp. 37-39). Sheriff Morgan testified that he then told Investigator Birchfield

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answer this question and has been unable to rely on any evidence in the record that contradicts Lewis' testimony that he never sold drugs or associated with anyone who did. (P Ex. D to County's Motion, Lewis deposition, at 53).

[6] The Plaintiffs note in their brief opposing the motion of the County Defendants that Sheriff Morgan was requested to bring to his deposition all records of any complaints received by his office concerning the Capri Club, but he produced none. (See Plaintiffs' brief opposing the County's Motion, p. 12; P Ex. A to County's Motion.) The Plaintiffs should have filed a motion to compel with this Court if they were experiencing discovery problems.

Investigator Birchfield also recalls that the decision to use a SWAT team was made because the Wadley Police Department had had difficulty controlling fights at the club and because ABC Agent Dennis Farr had been thrown out of the club when he attempted to check on compliance with the alcoholic beverage control laws. (County's Ex. A, Birchfield Affidavit, ¶ 16). The Plaintiffs dispute the fact that Agent Farr was thrown out of the club. (P Ex. P to County's Motion, Spradley Deposition, at 304-05). The Plaintiffs also note that the Wadley Police Department records, which Defendants City of Wadley, Freddie Morgan, and Gregory Dendinger have furnished in support of their Motion for Summary Judgment, cover periods that occurred after the first raid. (See Plaintiffs' "Supplemental Opposition to Defendants City of Wadley Motion for Summary Judgment," p. 1; City's Exs. A-D).

to investigate and that if he decided that a "drug operation there" was in order, to go ahead with it. **Id.**, at 37.

Plaintiffs Spradley and James were present during the December, 1990, raid. (P Ex. B to County's Motion, Spradley, deposition, at 305; P Ex. C to County's Motion, James deposition, at 21). These Plaintiffs testified that the officers in ski masks rushed in without saying anything, that other officers soon followed, and that guns were pointed at the Plaintiffs, employees, and patrons. (P Ex. B to County's Motion, Spradley deposition, at 315, 317; P Ex. C to County's Motion, James deposition, at 21, 22). Plaintiff Spradley testified that he thought it was a robbery. (P Ex. B to County's Motion, Spradley deposition, at 318). He further testified that one officer told him that he would like to look through the cash register and the door receipts (**Id.**, at 311); that he, Plaintiff Spradley, was given a receipt for marked bills removed from the door receipts box (**Id.**, at 311); and that the officers told those in the Club not to move until the raid was over (**Id.**, at 318).

Plaintiff James testified that when the officers came in, one jumped behind the counter where she was and told her to freeze (P Ex. C. to County's Motion, James deposition, at 21-22); that this officer told her to get out from behind the bar; that the officers then started checking the liquor, and an officer in a brown Chambers County Sheriff's Department uniform went through the cash register and everything (**Id.**, at 22-23); that she saw Chief Morgan and Officer Dendinger in the Club (**Id.**, at 26); that Chief Morgan refused her request when she asked him if she could go to the bathroom (**Id.**, at 27); and that Officer Dendinger told one man to shut up or he would shut him up (**Id.**, at 30).

Plaintiffs Swint, James, and Lewis were present during the March, 1991, raid (County's Ex. B, Swint deposition, at 57; 75-76; County's Ex. C, James deposition, at 33; P Ex. D to County's Motion, Lewis deposition, at 49). The accounts given by these Plaintiffs are similar to those of the first raid in March: the entry team's coming in unannounced, followed by the other teams, and guns being pointed at the Plaintiffs and others in the club. (County's Ex. B, Swint deposition, at 75, 76; P Ex. C to County's Motion, James deposition, at 39; P Ex. D to County's Motion, Lewis deposition, at 49). Plaintiff James testified that during this second raid an officer also came behind the bar and pointed a gun at her and another girl who was behind the bar with James (P Ex. C. to County's Motion, James deposition, at 39), and that the officers told people "to hit the floor." (**Id.**, at 40; P Ex. D to County's Motion, Lewis deposition, at 49).

Plaintiff Lewis testified that when he refused "to hit the floor" as ordered, an officer ordered him to put his hands over his head (P Ex. D to County's Motion, Lewis deposition, at 50); that an unmasked officer walked around looking at him and then told the other officer: "He's the one. He's got what we want," and that this officer then told him, "Come on out the door, boy" (**Id.**, at 50-51); that he was then taken outside at gunpoint (**Id.**, at 49-55);[7] that one of the officers wore a Chambers county

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[7] Investigator Birchfield attests that he "did not see any officer abuse any patrons of the Club nor point a gun in anyone's face." (County's Ex. A, Birchfield affidavit, ¶ 27). Chief Morgan attests that his officers "made no search [and] pointed no guns at anyone" and that he "saw no one search the club [and] saw no officers assault anyone." (City's Ex., Freddie Morgan affidavit).

Sheriff's Department jacket (**Id.**, at 79-8;); and that once outside, he was shoved against the wall, and the officers searched through his pockets and his wallet (**Id.**, at 50-53; 80-81; 83).

Each raid lasted about 1½ to 2 hours. (P Ex. B. County's Motion, Spradley deposition, at 318; P Ex. P Ex. C to County's Motion, James deposition, at 21; P Ex. D to County's Motion, Lewis deposition, at 63-64). Sheriff Morgan admitted in his deposition that, to his knowledge, the raids of the Capri Club were the only raids of a night club in Chambers County that had occurred there during his twenty-one years as Sheriff. (James Morgan deposition, at 44-45).[8] According to an affidavit signed by a Mattie Staples, Defendant Dendinger commented to her about two months after the last raid that "he was going to stop people from coming to Club Capri, . . . that the white people did not cause any trouble and he was going to straighten the black people out." (P Ex. to City's Motion, Staples Affidavit).[9] Statistics furnished the Plaintiffs by the Wadley Police Department indicate that during the period of January 17, 1988, through April 20, 1991, a good many arrests of blacks for DUI occurred on Highway 22 where the Capri Club is located. (P Ex. E to County's Motion).

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[8] Both Sheriff Morgan and Investigator Birchfield deny that the raids were racially motivated. (County's Ex. A, Birchfield Affidavit, ¶ 25; County's Ex. D, James Morgan Affidavit, ¶ 10).

[9] Chief Freddie Morgan attests that race was not a motive for raiding the clubs. (City's Ex., Freddie Morgan affidavit of December 18, 1991).

Contentions of Chambers County Defendants: As to the **federal** claims, Defendant **Chambers County Commission** contends that it did not participate in the two raids, that no policy or custom can be attributed to it, that Sheriff Morgan is not the final policy-maker for the County, that the Plaintiffs have suffered no personal injury, and that Plaintiffs Swint and Spradley cannot show that they suffered any business loss as a result of the raids. As to the **State** claims, Defendant **Chambers County Commission** contends that these claims are barred because the Plaintiffs failed to file a claim initially with the County, as required by State law. The Plaintiffs having conceded that these claims are barred, they will be dismissed as to this Defendant.

As to the **federal** claims, Defendant **Sheriff James Morgan** contends that he is entitled to qualified immunity, and that he did not participate in the raids and cannot be held liable on a **respondeat superior** theory. As to the remaining **State** claim against Defendant **Sheriff Morgan** in Count III, he contends that he did not participate in the raids and that he is absolutely immune under the Eleventh Amendment.

Contentions of the City of Wadley Defendants: Defendants **City of Wadley, Chief Freddie Morgan, and Officer Gregory Dendinger** contend that they are entitled to summary judgment as a matter of law, that the warrantless arrests were legal, and that the motion is based on the Complaint, Answer, Motion to Dismiss, and on the affidavit of Chief Morgan. The motions to dismiss, which this Court denied in part on January 22, 1990, attack the sufficiency of the allegations, raise the defense of qualified immunity for the individual Defendants, and

state properly that the Municipal Defendant cannot be held liable under § 1983 on a **respondeat superior** theory.

Contentions of the Plaintiffs: The Plaintiffs' arguments are that each raid was wrongful at its inception, that the facts did not warrant the use of a SWAT team, and that the raids were racially motivated and in violation of clearly established law.

As to the **Chambers County Defendants,** the Plaintiffs counter that Sheriff Morgan acted as the final repository of county authority and could bind the County with his decision-making, and that Sheriff Morgan cannot insulate himself from Section 1983 by delegating his duties to others. The Plaintiffs also urge that Sheriff Morgan is not entitled to qualified immunity because his actions violated clearly established law under the First Amendment right to freedom of association, under the Fourth Amendment right to be free from unreasonable searches and seizures, under the Fifth Amendment right of due process, and under the Fourteenth Amendment right to equal protection under the law.

As to the **City of Wadley** Defendants, the Plaintiffs counter that none of the documents submitted with the motions of these Defendants support the actions taken by these officers. The Plaintiffs contend that the logs of the Wadley Police Department and the admission of Defendant Dendinger of his intention to close the Capri Club evidence that the Capri Club was signaled out for harassment.

Summary Judgment Standard. In considering a motion for summary judgment, this court must refrain from deciding material factual issues but, rather, must

decide whether such factual issues exist and, if not, whether the party moving for summary judgment is entitled to judgment as a matter of law. **See** *Dominick v. Dixie National Life Ins. Co.*, 908 F.2d 1559 (11th Cir. 1987). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. **See** *Tippens v. Celotex Corp.*, 805 F.2d 949 (11th Cir. 1986). "Rule 56(c) mandates the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); **accord** *Kramer v. Unitas*, 831 F.2d 994, 997 (11th Cir. 1987). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material fact**" [emphasis in original]. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party * * * . If the evidence is merely colorable * * * or is not significantly probative, summary judgment may be granted." *Anderson*, **supra,** 477 U.S. at 249-50; **accord** *Brown v. City of Lewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988).

INDIVIDUAL DEFENDANTS SHERIFF MORGAN, CHIEF MORGAN, AND OFFICER DENDINGER

Federal Claims: These Defendants, who are also sued in their individual capacity, contend that they are entitled

to **qualified immunity.** Government officials, acting in good faith and "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1981). Once a defendant shows that he was acting within the scope of his discretionary authority, then the plaintiff must show that he lacked good faith by demonstrating that the official's actions "violated clearly established constitutional law." *Rich v. Dollar,* 842 F.2d 1558, 1563 (11th Cir. 1988).

"[T]he right the official is alleged to have violated must have been 'clearly established' in a . . . particularized . . . sense: the Contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [T]he very action in question [need not] previously [have] been held unlawful, . . . but . . . in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1986). Officials are not required to predict the law, yet they are required to apply clearly established law to the factual setting before them. **See** *Stewart v. Baldwin County Bd. of Educ.,* 908 F.2d 1499, 1504 (11th Cir. 1990) [citing *Anderson,* 483 U.S. at 641; *People of Three Mile Island v. Nuclear Regulatory Comm'rs.,* 747 F.2d 239, 244 (3d Cir. 1984)].

If the law was not clearly established at the time of the official's conduct, then he is entitled to qualified immunity if he was acting in good faith and if it was reasonable to believe he had a right to do so. *See Stewart,* 908 F.2d at 1503. Otherwise, the defendant is not entitled

to summary judgment on qualified immunity grounds. **Id.**

None of these officers are shown by uncontradicted evidence to be entitled to summary judgment on qualified immunity grounds for their participation in these raids. As to the Plaintiffs' equal protection claims in Counts I and II, in December, 1990, and in March, 1991, "the equal protection right to be free from intentional racial discrimination" was clearly established. **See** *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1478 (11th Cir. 1991) [citing *Washington v. Davis*, 426 U.S. 229, 239-41 (1976)]; **see also** *Wayte v. United States*, 470 U.S. 598, 608 (1984) ("selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints" and "the decision [to enforce the laws] may not be based upon an unjustifiable standard such as race"). Also as to the Plaintiffs' due process claims in these two counts, a reasonable officer would have known that deliberate indifference to any one of the Plaintiffs' due process rights would violate the Fifth and Fourteenth Amendments. *See Rivas v. Freeman*, 940 F.2d 1491, 1496 (11th Cir. 1991).

As to the Plaintiffs' Fourth Amendment claims in Count I, the law was also clearly established in December, 1990, and in March, 1991, that:

> "Only in the face of 'exigent circumstances,' where obtaining a warrant would greatly compromise important law enforcement objectives, does the warrant requirement yield. When exigent circumstances coexist with probable cause, the Fourth Amendment has been held to permit warrantless searches and seizures." *United States*

v. Pantoja-Soto, 739 F.2d 1520, 1523 (11th Cir. 1984), **cert.den.** 470 U.S. 1008 (1985).[10]

In December, 1990, and in March, 1991, the law was also clearly established that the protection of the Fourth Amendment extends not only to private residences, but also to business premises, **see** *Pantoja-Soto*, 739 F.2d at 1523; and that each person in the Capri Club "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure." **See** *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Their presence in the Club where illegal drug activity had likely occurred did not extinguish this protection. **Id.**

The undisputed facts are that Sheriff Morgan approved two raids of the Capri Club based on probable cause to make a warrantless arrest of a patron believed to be inside the club at the time an undercover agent purchased drugs from him. The undisputed facts are also that Chief Morgan and Officer Dendinger participated in these raids. Although Sheriff Morgan, Chief Morgan, and Investigator Birchfield have all attested that the raids were not based on race, the Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact as to whether the raids may have been racially motivated. The affidavit of Mattie Staples that Officer Dendinger made a comment to her after the second raid that indicated intentions to close the club because of the race of its owners and patrons remains undisputed. Also,

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[10] Exigent circumstances arise; they are not circumstances that become exigent after they are manufactured for the convenience of law enforcement officers. **See** *Pantoja-Soto*, 739 F.2d at 1524.

Plaintiff Spradley has attested that, "During one of the raids one of the officers promised they were coming back and that they would not stop until they closed the club." (P Ex. to City's Motion, Spradley affidavit, at 2).[11] The Plaintiffs have also come forward with evidence that the club was the only club to Sheriff Morgan's knowledge that had ever been raided in Chambers County during his twenty-one years there as Sheriff. The Plaintiffs have also furnished undisputed evidence that a good number of blacks, as opposed to whites, were arrested for DUI offenses during the period of 1988 and 1991 and that these arrests occurred near the Capri Club. This evidence, at this stage, has mixed implications because it may or may not be evidence of racial discrimination.

Having found that the law was clearly established in December, 1990, and in March, 1991, that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances and that selective enforcement of the laws based on race violates the Equal Protection Clause of the Fourteenth Amendment, the Court also finds that the Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact as to whether exigent circumstances existed for the actions taken by the drug task force and as to whether the raids were racially motivated. The Court finds further that the Plaintiffs have come forward with sufficient evidence to create a

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[11] This affidavit is attached to the "Plaintiffs' Supplemental Opposition to Defendants City of Wadley Motion for Summary Judgment," filed January 17, 1992.

genuine issue of material fact as to whether the Defendants conspired to deprive the Plaintiffs of equal protection of the laws because the Capri Club was owned by blacks and frequented by black patrons.

The Plaintiffs also contend that the raids violated their right to association, speech and movement, yet the Court cannot agree that the Plaintiffs clearly had such a right. **See** *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also, Benigni v. City of Hemet*, 879 F.2d 473, 476-77 (9th Cir. 1988). Accordingly, this Court will grant a partial summary judgment insofar as the Plaintiffs may claim in Count II that their freedom of association, speech and movement were violated by the raids on the Club.

As to the Plaintiff's Sixth Amendment claim in Count I that they had a right to be informed of the accusation against them, this Court cannot agree that at this stage they clearly had such a right. *See McNeil v. Wisconsin*, 111 S.Ct. 2204, 2207 (1991) (Sixth Amendment rights do not attach until adversary proceedings have commenced). Accordingly, this Court will grant a partial summary judgment insofar as the Plaintiffs may claim in Count I that they had a right to be informed of accusations against them.[12]

Defendant Sheriff Morgan also contends that he cannot be held liable under Section 1983 on a **respondeat superior** theory. While this Court agrees that he cannot be

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[12] The only other Constitutional claim remaining in Count I appears to be that of the Thirteenth Amendment, which the Plaintiffs indicated during the pretrial conference they would not pursue. The Court therefore considers this claim not before it.

liable under this theory, he can be liable if the Plaintiffs establish that the Sheriff personally participated in the wrongful activity or establishes a causal connection between his conduct and the alleged deprivation. **See** *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990), **cert.den.**, 111 S.Ct. 2056 (1991). This causal connection can be established where the official's "custom or policy . . . resulted in deliberate indifference to constitutional rights." **See** *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991) [citing *Zatler v. Wainwright*, 802 F.2d 397 (11th Cir. 1986)].

The Plaintiffs have come forward with sufficient evidence to show that a genuine issue of material fact exists as to whether the raids were causally connected to Sheriff Morgan's approval of the two raids and to his policy encouraging these raids. The evidence presented by the Plaintiffs and the affidavits of Sheriff Morgan and Investigator Birchfield show that the Sheriff's policy was to not initiate a narcotics raid on a business establishment without a search warrant or a drug buy. (County's Ex. A, Birchfield Affidavit, ¶ 26; County's Ex. D, Morgan Affidavit, ¶ 4; James Morgan deposition, at 13-15, 37-39). This policy of allowing a raid on a business establishment with a drug buy but no exigent circumstances is evidence of an insufficient basis for a raid, or a search, of a business establishment or a home. Certainly, a drug buy by a reputable confidential informant is insufficient to support a search absent some showing that it was impractical or impossible to obtain a search warrant or an arrest warrant. Accordingly, Defendant Sheriff Morgan's motion for summary judgment should be denied on the basis that

there is evidence of his policy to authorize a raid of an establishment solely on the basis of a drug buy.

State Claims: The state claim remaining against **Sheriff Morgan** is Count III, a claim of assault and false imprisonment. This Court denied the Sheriff's motion to dismiss this count on absolute immunity grounds in its January 22, 1992, order because the Plaintiffs had alleged that Sheriff Morgan was among those officers who invaded the Capri Club and who engaged in the allegedly illegal raids. (**See** ¶ 12 of Complaint). The undisputed facts are that he was not with the officers when they invaded the Capri Club, as alleged, and this Court agrees that he is entitled to absolute immunity. **See** *White v. Birchfield,* 582 So.2d 1085 (Ala. 1991). The claim in Count III appears to be an action against Sheriff Morgan because the drug task force, which included his employees and those deputized by him, committed the tort alleged in this count. **See Id.,** at 1088. The claim is against the Sheriff not for his "actions as an individual, but upon his official position as 'employer' of" those participating in the raids. **See Id.**

The facts are undisputed that **Chief Morgan** and **Officer Dendinger** participated in the alleged raids. Chief Morgan has attested that none of his officers pointed a gun at anyone and that he saw no officers assault anyone. The Plaintiffs have alleged that guns were pointed at those present in the club and that they were not free to leave and that they were threatened and questioned, although the Plaintiffs have not produced evidence that the Chief himself or Officer Dendinger held a gun on anyone. The Court finds, however, that the Plaintiffs have come forward with sufficient evidence to

create a genuine issue of material fact as to whether the raid that these Defendants engaged in restricted the Plaintiffs' freedom of movement and would have caused a reasonable person to feel threatened; and as to whether these Defendants, while inside the bar, restricted anyone's freedom of movement. **See** CODE OF ALABAMA [1975], § 6-5-170 ("false imprisonment [is] the unlawful detention of another for any length of time whereby he is deprived of his personal liberty"); *Evans v. Walker*, 237 Ala. 385, 187 So. 189 (1939) (officer's use of excessive force can constitute an assault and battery); **see also** *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981). At this stage of the proceedings, the Court will not dismiss Count III as to these two Defendants.

As to Count IV, the only defense argument for summary judgment that relates to this count appears to be those stated in the previous motions to dismiss filed by these Defendants. The Court denied these motions in its order of January 22, 1992 on all defense motions to dismiss. The Plaintiffs have sued the Municipal Defendants in this count but have not named the individual Defendants other than to refer to them vaguely as "defendants known and unknown law enforcement officers and agencies." At this stage of the proceedings, the Court cannot conclude that this count should proceed against Officer Dendinger because the Plaintiffs have not come forward with any evidence to show that he was responsible for the hiring or training or supervision of anyone involved in the raids so as to hold him liable on this count. As to Defendant Chief Morgan, however, the facts are undisputed that he was the Chief of Police for the City of Wadley and, as such, would have been in a position to

hire or supervise or train. Count IV is due to be dismissed as to Officer Dendinger but will not be dismissed as to Chief Morgan.

MUNICIPAL DEFENDANTS CHAMBERS COUNTY COMMISSION, CITY OF WADLEY

Federal Claims: A municipality cannot be held liable under Section 1983 on a theory of **respondeat superior. See** *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978). The municipality can be liable, however, if its policy, custom, or practice is the moving force behind the constitutional wrong. **Id.**; *Hafer v. Melo*, 112 S.Ct. 358, 361-62 (1991). The policy need not have received final approval by the municipality, for the policy may be an alternative selected by the final decision-maker for the municipality in that particular area. **See** *Pembaur v. Cincinnati*, 475 U.S. 469, 481-84 & n.10 (1985) (citing *Monell*, 436 U.S. at 690-91).

The City of Wadley contends, and this Court agrees, that it cannot be held liable under Section 1983 on a theory of **respondeat superior.** This municipal defendant can be held liable on Counts I and II, however, for Chief Morgan's decision to participate in the allegedly illegal raids of the Capri Club under Section 1983 if Chief Morgan is the final policy-maker for the City in the area of law enforcement. **See** *Pembaur*, 475 U.S. at 481-84 & n.10. The parties have not briefed this issue, and the Court cannot grant summary judgment to these Defendants on a **respondeat superior** theory without some assertion that

the Plaintiffs cannot prove that Chief Morgan was the final policy-maker in this area.[13]

The Court finds that Sheriff Morgan, in his capacity as the chief law enforcement officer for the county, may have been the final policy maker for the County in making his decision to approve the allegedly illegal raids. **See** *Pembaur,* 475 U.S. at 481-84 & n.10; *Parker v. Williams,* 862 F.2d 1471, 1477-81 (11th Cir. 1989). The issue is whether Sheriff Morgan was the "ultimate repository of county authority" in making a decision as to law enforcement. **See** *Parker,* 862 F.2d at 1477-78. As the Sheriff of the County, he had to deputize officials from outside the county before they could even participate in the raids. **See** CODE OF ALABAMA [1975], § 36-22-3(4). His duty is that of ferreting out crimes and of apprehending and arresting criminals in his County, and the County Commission must furnish him with the necessary equipment, "including automobiles and necessary repairs," for that purpose. **See Id.**; CODE OF ALABAMA [1975], § 36-22-18. The Court is persuaded by the Plaintiffs that Sheriff Morgan may have been the final decision-maker for the County in ferreting out crime, although he is a State of Alabama employee. *See Parker,* 862 F.2d at 1475.

State Claims: Municipalities, unlike the State, can be held liable under Alabama law for the negligent or

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[13] The question of whether an official is the final decision-maker in a particular area is a matter of state law. **See** *Brown,* 923 F.2d at 1480 (citing *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701 (1989)). If State law does not assign to Chief Morgan the final authority to engage in search and seizures, then he cannot bind the City. **Id.**

unskilled acts of their agents or employees. **See** CODE OF ALABAMA [1975], § 11-47-190; *Rich v. City of Mobile*, 410 So.2d 385, 387 (Ala. 1982); *Rutledge v. Baldwin County Comm'n*, 495 So.2d 49, 53 (Ala. 1986). While a municipality cannot be held liable for its agent's unlawful arrest and false imprisonment, **see** *Boyette v. City of Mobile*, 442 So.2d 61, 62 (Ala. 1983), a municipality can be held liable for an unskilled agent's assault, **see** *City of Birmingham v. Thompson*, 404 So.2d 589, 589-91 (Ala. 1981). A municipality can also be charged with its negligence in hiring or failing to supervise and train its agents. **See** *Seals v. City of Columbia*, 575 So.2d 1061, 1064 (Ala. 1991).

The Plaintiffs, having conceded that the State claims against **Chambers County** are barred for failure to file a claim with the County, Counts III and IV will be dismissed as to **Chambers County.**

As to the **City of Wadley,** it can be held liable on a **respondeat superior** theory for an unskilled agent's assault, but it cannot be held liable on that theory for false imprisonment. The assault claim against the City remains, but the claim of false imprisonment in Count III must be dismissed.

As to Count IV, the **City of Wadley** is charged not on a theory of **respondeat superior,** but on a theory of its own negligence in hiring, supervising and training its municipal employees. The parties have not disputed the City's responsibility in this area.

As to Counts III and IV, the claims remaining against the **City of Wadley** are those relating only to the March, 1991, raid, as the claims relating to the December, 1990,

raid are barred by the Plaintiffs' failure to file their claims within six months of that raid.[14]

Conclusion. This Court concludes that the motions for summary judgment of all Defendants are due to be denied, with the exception that some of the claims as to some of the Defendants are due to be dismissed as noted in the above discussions. An Order will be entered in accordance with this Opinion.

DONE, this 2nd day of June, 1992.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES
DISTRICT JUDGE

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[14] See **supra** note 2.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, VS. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	)	CIVIL ACTION NO. 91V-965-E

ORDER

(Filed June 26, 1992)

This cause is now before this Court on Defendants' Motions to Reconsider filed herein June 12 and 15, 1992.[1]

The Defendants now urge this Court to find as an undisputed fact that the officers involved in the two raids of the Capri Club acted under exigent circumstances in invading the club to make a warrantless arrest of an individual who had just sold drugs to an undercover officer.[2] The facts this Court finds to be undisputed are

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[1] Hereinafter, the City of Wadley Defendants include the City, the Police Chief Freddie Morgan, and Police Officer Gregory Dendinger, and the Chambers County Defendants include the County and Sheriff James Morgan.

[2] The Chambers County Defendants have submitted revised affidavits "to address the concerns of this Court regarding whether exigent circumstances were present." (Chambers

that these officers had time to organize a team of 30 to 40 armed officers for the purpose of invading the Capri Club on **two** different occasions, yet these officers did not have time to obtain the independent and neutral judgment of a magistrate that there was probable cause to believe that drugs were being sold in the Club and that a raid was necessary to obtain evidence of criminal conduct from certain named individuals suspected of using the club to carry on their drug trade.[3] What concerns, and shocks, this Court is the premeditated show of force and the restriction of the freedom of those persons in the club who did not shed their constitutional rights at the door. **See** *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979); *Graham v.*

County Defendants' Motion for Reconsideration, p. 3). The City of Wadley Defendants state: "It is hard to believe that you would question the officers exigent circumstances, in light of the fact, the officers didn't know until they actually made the buy who was selling drugs." (City of Wadley Defendants' Brief filed June 12, 1992, p. 3).

[3] Investigator Birchfield's revised affidavit further convinces this Court that its denial of summary judgment was proper. (Birchfield Affidavit dated June 15, 1992, attached to Chambers County Defendants' Motion for Reconsideration). Investigator Birchfield admits that "a warrant to search the entire club would limit the ability to search suspected individual drug dealers." **Id.,** ¶ 16. This implies that the purpose of the raid was to gather evidence of criminal conduct from suspected drug dealers. Plaintiff Lewis, as now admitted by the City of Wadley Defendants, was a suspected drug dealer. (**See** City of Wadlev Defendants' Motion to Reconsider, p. 2; Affidavit of Chief Freddie Morgan dated June 10, 1992). Even those suspected of crime cannot be searched without a warrant unless carefully guarded exceptions to a warrant exist under the circumstances. **See** *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971).

Connor, 490 U.S. 386 (1989) [Fourth Amendment inquiry is what force was "objectively reasonable" under the circumstances]. Furthermore, this Court finds that the Plaintiffs have come forward with sufficient evidence on their equal protection claim to create a genuine issue of material fact as to whether these two raids were racially motivated.[4]

The Chambers County Defendants correctly point out that whether Sheriff James Morgan was the final policy maker is a question of law that this Court can decide. What the Court decided in its June 2, 1992, Opinion and Order was that the Plaintiffs had come forward with sufficient evidence to persuade this Court that Sheriff Morgan may be the final policy maker for the County. The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the

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[4] The Defendant City contends that this Court erred in finding as an undisputed fact that Officer Dendinger made a comment to a Mattie Staples that "he was going to stop people from coming to Club Capri, . . . that the white people did not cause any trouble and he was going to straighten the black people out." (Staples Affidavit attached as an exhibit to Plaintiff's response to the City's Motion for Summary Judgment). The City of Wadley did not provide in its summary judgment materials the deposition testimony of Officer Dendinger, which testimony it now provides with its Motion to Reconsider, to contradict Ms. Stapels' affidavit. The Court considers this affidavit, however, sufficient evidence to create a genuine issue of material fact as to whether the raids may have been racially motivated.

jury.[5] **See** *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1480-81 & nn. 10, 11 (11th Cir. 1991)

This Court is of the opinion that summary judgment was properly denied Defendants in its Opinion and Order dated June 2, 1992.[6] Accordingly, it is ORDERED by this Court that Defendants' Motions to Reconsider filed herein June 12 and 15, 1992, be, and the same are hereby, DENIED.[7]

DONE this 26th day of June , 1992.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES
DISTRICT JUDGE

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[5] The City of Wadley defendants urge that Chief Freddie Morgan was not the policy maker for the City when he participated in the raids because the raids were controlled by the policy of Sheriff James Morgan. Chief Morgan, however, made the decision to participate in the raids, and whether he made this decision as the final policy maker for the City is a question this Court will decide before the case goes to the jury. **See** *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1985).

[6] The City of Wadley Defendants urge further that this Court also erred in its ruling on the state claims. The Court remains with its conclusion that the Plaintiffs came forward with sufficient evidence to create a genuine issue of material fact as to whether the raids, and their show of force, might be considered excessive force under the circumstances sufficient to constitute a civil assault.

[7] The Court notes that the Chambers County Defendants indicated in their June 15, 1992, Motion for Reconsideration that supporting briefs would be filed within seven days. As of the date of this Order, no such briefs have been filed, and this Court will not, at this date, await the filing of other materials before ruling on the pending motions for reconsideration.

Tom SWINT; Tony Spradley; Drecilla James and Jerome Lewis,

Plaintiffs-Appellees,

v.

The CITY OF WADLEY, ALABAMA; Freddie Morgan and Gregory Dendinger in their official and individual capacities; Chambers County Commission, Defendants-Appellants,

Chambers County Sheriff's Department, Defendant,

James C. Morgan, in his official and individual capacity, Defendant-Appellant.

No. 92-6574.

United States Court of Appeals,
Eleventh Circuit.

Jan. 18, 1994

Appeal from the United States District Court for the Middle District of Alabama.

ON SUGGESTION FOR
REHEARING EN BANC

(Opinion 11/3/93, 11th Cir., 5 F.3d 1435).

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

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*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eight Circuit, sitting by designation.

PER CURIAM:

Upon consideration of Defendant-Appellant James C. Morgan's suggestion for rehearing en banc, the Court orders that its opinion be modified in the following three respects:

(1) The first sentence of the second paragraph of the opinion (which is the first sentences of the first full paragraph on 5 F.3d at 1439) is deleted, and in its place are inserted the following two sentences:

> We affirm the district court's denial of the individual defendants' qualified immunity summary judgment motions insofar as the Fourth Amendment is concerned, and we also affirm the denial of summary judgment on qualified immunity grounds insofar as the equal protection claims against Officer Dendinger and Chief Morgan are concerned. We reverse the denial of summary judgment to Sheriff Morgan on the equal protection claims, and we reverse the denial of summary judgment on qualified immunity grounds to all three individual defendants on the due process claims.

(2) The second paragraph of section II. A.2.b. (under the heading "The Equal Protection Clause Claims") on 5 F.3d at 1447 (which is also the first full paragraph in the second column on 5 F.3d at 1447) is deleted, and inserted in its place are the following two paragraphs:

> Defendants do not challenge the district court's holding that at the time of the raids the right to be protected from intentional racial discrimination in law enforcement was clearly established. Instead, they argue that summary judgment should have been granted because

there was no genuine issue of material fact that they engaged in such discrimination. Based on our review of the record, we agree with the district court that a genuine issue of material fact does exist about whether Officer Dendinger and Chief Morgan engaged in intentional racial discrimination in authorizing or participating in the raids. Mattie Staples' testimony about Officer Dendinger's alleged statement to her suffices to create a genuine issue of material fact on that issue as to Officer Dendinger and his police chief, Freddie Morgan. The district court properly denied the summary judgment motions as to the equal protection claims insofar as those two defendants are concerned.

Sheriff Morgan, however, is a different matter. Neither he, nor any of his deputies, made any statement that he or his department intended to close the Club down because of the race of the owners and patrons. The fact that this club is the only one Sheriff Morgan authorized to be raided in his twenty-one years as sheriff does not prove that he was motivated by racial considerations. The first club raided had to be either black-owned or white-owned, and that it was one instead of the other proves nothing. Likewise, it is hardly surprising that there would be a higher incidence of DUI arrests for blacks than whites in the vicinity of a club that sells alcoholic beverages to a black clientele. Absent some evidence of racially disproportionate arrests compared to the actual incidence of violations by race, there is no basis for inferring racially selective law enforcement. Because there is no evidence that Sheriff Morgan's action in authorizing the raids on the Club were motivated by intentional racial discrimination, there

> is no genuine issue of material fact insofar as the equal protection claims relate to him, and the district court erred in denying his summary judgment motion on those claims.

(3) The one paragraph of Section II.A.3 (under the heading "Summary") on 5 F.3d at 1448 is deleted, and in its place the following paragraph is inserted:

> We hold that the individual defendants in this case have established the defense of qualified immunity as to plaintiffs' due process claims, but not as to the Fourth Amendment claims. We further hold that Officer Dendinger and Chief Morgan did not establish their entitlement to summary judgment on the equal protection claims, but Sheriff Morgan did. Accordingly, the individual defendants' summary judgment motions were properly denied except as to the due process claims, and except as the equal protection claims concerned Sheriff Morgan. Judgment should have been entered for all of the individual defendants on the monetary part of the due process claims, and judgment should have been entered for Sheriff Morgan on all aspects of the equal protection claims.

No judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion for rehearing en banc is DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * *

United States Constitution, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the

members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 U.S.C § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1985.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any

person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.